C.4603 - RL

ORIGINAL

Decision No. 35342

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

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| In the Matter of the Investigation on the Commission's own motion into the operations, rates, charges, contracts, and practices of EASTSIDE BUILDING MATERIALS CO., INC., a corporation, EASTSIDE HAULING CO., INC., a corporation, WILLIAM M. NICHOL, ARTHUR JANES, and RUDOLF WLADYKA. | ) | Case No. 4603 |

R. S. CROSSLAND and SPURGEON AVAKIAN, for Transportation Department of the Railroad Commission.

GEORGE J. TAPPER, for respondents Eastside Building Materials Co., Inc. and Eastside Hauling Co., Inc.

RUDOLF WLADYKA, in propria persona.

E. L. BLACKMAN, for California Dump Truck Association, interested party.

HAVENNER, Commissioner:

## O P I N I O N

The essential point of controversy to be resolved in this decision is whether the two corporate respondents, Eastside Building Materials Co., Inc. and Eastside Hauling Co., Inc., should be treated as separate bodies or as one entity in connection with their dealings with each other considered in this proceeding.

This case was instituted by the Commission to ascertain the facts pertaining to the transportation performed by certain of the respondents for the others and the manner and amount of payment for such services. Public hearing was held at Los Angeles

November 5 and 6, 1941. The matter was submitted on the latter date subject to the filing of briefs which were received subsequently and have been considered together with the evidence of record.

There is no substantial dispute as to the facts involved but they must be known and appreciated before the legal question of whether to observe or disregard the corporate entities may be concluded appropriately. The facts are numerous and somewhat complicated. To shorten their narration, Eastside Building Materials Co., Inc. will be referred to as the Materials Company and Eastside Hauling Co., Inc. will be called simply the Hauling Company. The Materials Company is a dealer in, and a large shipper of, building materials. The Hauling Company has highway and city carrier permits and purportedly transports much of the property of the Materials Company. Both of these companies are managed by J. C. Slater, who is the president and principal stockholder of each. For approximately the past four years the Hauling Company has had most of the transportation for the Materials Company performed by subhaulers such as respondents Nichol, Janes and Wladyka, who each possessed both highway and city carrier permits. The Hauling Company has paid only 80 or 90 per cent of the amount collected from the Materials Company to the subhaulers. The subhaulers were not required to collect the full minimum rates from the overlying carrier because, while the Commission's minimum rate orders compel carriers to charge shippers the minimum rates, such orders have not been construed as applicable to a transportation arrangement between one carrier and another. The significance of determining whether or not the separate corporate entities should be

observed becomes apparent from the foregoing facts. If the Hauling and Materials Companies are considered as one business concern, the subhaulers have dealt directly with the shipper and should have collected the minimum rates applicable to the transportation performed instead of the lesser amounts they received.

The evidence of record illuminates the relationship between the two corporate respondents. Slater owns about 90 per cent of the Hauling Company's, and approximately two-thirds of the Materials Company's stock. He started the building materials business in 1931 as an individual and soon sold a one-third interest therein to L. G. Cramer in return for capital. The business was incorporated in 1936. Slater received a certificate for two-thirds of the shares of the corporation and another certificate for the other one-third of the shares was issued in his name and transferred by endorsement to Cramer. The latter's name has never appeared as a stockholder on the records of the company, he has not been a director or officer, and has taken no active part in the business. The Hauling Company originated in 1934 as a partnership composed of Slater and his brother, Ben. This company incorporated in 1936. Two certificates, each representing 650 shares, the total outstanding, were issued to Slater, but one of these he endorsed to his brother. The latter's stock was purchased by Slater in 1937. He was sole owner of the corporation until December, 1940, when he transferred 50 shares to another brother, Isador. Slater subsequently sold 30 shares to a nephew and 20 shares to a sister-in-law.

The two corporations had identical officers and directors until December, 1940. The officers also were the directors. Slater always has been the president and the only officer to

receive a salary for acting as an officer. The secretary of the two companies regularly has been an office employee of one or both of such companies. The vice-president of the two corporations always was the private secretary of their attorney, George Tapper, until December, 1940, at which time Isador Slater became vice-president of the Hauling Company.

Since 1937 the Hauling Company's "office" has consisted merely of a desk and filing cabinet at the office of the Materials Company. Most of the Hauling Company's office work has been performed by employees of the Materials Company, paid by the latter. Such work included bookkeeping, checking and tabulating the daily reports of from ten to twenty subhaulers, preparation of invoices and statements, handling insurance matters, and correspondence. The evidence shows also that since 1939 the employees of the Hauling Company have been carried on the payrolls of the Materials Company and reported as its employees in connection with Workmen's Compensation insurance and Social Security taxes. The record shows further that the Materials Company often used its funds to pay obligations of the Hauling Company, subsequently charging such amounts on its books to the Hauling Company's account.

It is in evidence that, although Slater received a substantial salary from both companies, no attempt has been made to segregate or allocate his working time between the two. Slater testified that for long periods he would devote himself to the affairs of one company exclusively and during such time receive his salary from the other company. The Hauling Company sold all of its trucks in 1938 and operated none of its own until 1940. Slater's duties for the Hauling Company were practically non-existent during that period, so at a directors' meeting held

in May, 1939 his salary was discontinued at his request. No salary has been authorized for Slater since. Subsequently, nevertheless, without authority from the directors, he withdrew from the Hauling Company $8,000, ostensibly as salary, and $7,000 which was set up on the books as officer's loans. The record shows that in September, 1939, the directors of the Hauling Company authorized the transfer of certain real property to Slater's wife in exchange for 140 shares of stock to be turned over to the company by Slater. The latter had the property transferred to his wife without surrendering any stock and had a purchase price of $1,400 charged to his account with the Hauling Company, but he has never paid this sum.

Counsel for the Transportation Department argues it is clear from the evidence there has been no separateness in fact between the Hauling Company and the Materials Company. He contends there has been a single control of both companies by Slater as well as a frequent handling of the affairs of the Hauling Company by the Materials Company as its own in a manner inconsistent with separateness of the two corporations. He asserts it is necessary to disregard the separate entities of the corporations for the purposes of this particular case to protect the minimum rate structure of the Commission and to prevent the Materials Company from obtaining transportation of its property at less than the applicable minimum rates. Counsel states that corporate entities should be ignored when there is such identity between them as to make one a mere agency or instrumentality of the other and failure to disregard them would produce an unjust result. This, it is alleged, is the situation in the case under consideration. Therefore, it is argued, the Commission should order the Hauling and Materials Companies to stop their use of

the corporate fiction to circumvent the minimum rate orders and should require the other respondents to collect their undercharges.

The attorney representing the corporate respondents did not attempt to refute the evidentiary statements hereinabove referred to, so it must be assumed they accurately portray the facts. However, he attaches much importance to the fact that both the Hauling and Materials Companies had their business inception prior to the passage of the Highway and City Carriers' Acts in 1935. This, it is contended, shows good faith in the creation of the two companies as it demonstrates that they were not organized to avoid the operation of the carrier statutes. It is averred that in California before corporate entities may be disregarded, bad faith on the part of such corporations must be shown. He argues that, as bad faith is not evidenced, the distinct corporate entities must be observed.

Complete consideration of the record prompts certain factual conclusions. The predecessors of the Hauling Company and the Materials Company were engaged in business before 1935, but incorporation of such companies occurred in 1936. J. C. Slater, who owns two-thirds of the Materials Company's stock and substantially all of the Hauling Company's, has controlled and dominated both corporations without regard to the directors. The office work of the Hauling Company was performed principally by employees paid by the Materials Company. The separate entities of such companies often has been disregarded by the corporations themselves. Most of the transportation for the Materials Company was performed through the agency of the Hauling Company which used subhaulers. The Hauling Company retained 10 per cent in some instances, and 20 per cent in others, of the rate charged for the hauling and paid the remainder to the subhaulers who did

the actual work. The respondents, Nichol, Janes and Wladyka, among others, acted as subhaulers for the Hauling Company and failed to receive the minimum rates applicable to the transportation they performed.

It is clear the separateness of the two corporations frequently has been ignored when it was convenient to do so. It is evident, also, such corporations, although not formed for that purpose originally, have been used to circumvent the minimum rate regulations established by the Commission pursuant to the Highway and City Carriers' Acts. Evasion of such regulations benefits the corporate respondents at the expense of the permitted carriers employed as subhaulers. Minimum rates were developed to protect the latter in accordance with the legislative mandate expressed by the above statutes.

The law pertaining to observance or disregard of the corporate fiction seems settled. The cases hold that the separate entities of corporations will be ignored where there is a lack of separateness in fact and where failure to pierce the corporate veil would occasion inequitable results. A review of the evidence impels the conclusion that there is such a unity of control and management between the Hauling Company and the Materials Company that there is no separateness in fact. Furthermore, it is manifest that, regardless of whether bad faith or fraudulent intent existed when the Materials and Hauling Companies were incorporated, since that time they have been used as separate entities for the purpose and with the intention of circumventing and nullifying the Commission's minimum rate regulations. Hence, the two corporate respondents must be treated as one business concern with respect to the transportation performed for the Materials Company

by the Hauling Company through subhaulers to prevent such corporations, by resort to the corporate fiction, from depriving permitted carriers of a substantial part of their proper compensation. The Hauling Company's corporate status being nominal, any rate differential is enjoyed by the Materials Company and ultimately by Slater. Thus, the Materials Company is afforded either an unfair selling advantage over competitors or a rebate. The corporate respondents will be ordered to stop the use of the device described to circumvent the Commission's minimum rate regulations. Respondents, Nichol, Janes and Wladyka, will be directed to collect their undercharges for transporting building materials of the Materials Company as subhaulers for the Hauling Company.

## O R D E R

Based upon the evidence of record and the findings and conclusions contained in the foregoing opinion,

IT IS ORDERED that the Eastside Hauling Co., Inc. collect from the Eastside Building Materials Co., Inc. the minimum rates applicable to the transportation of building materials when such service is performed for the latter, and pay said rate to the subhaulers when such are employed to perform the actual transportation thereof.

IT IS FURTHER ORDERED that William N. Nichol, Arthur Janes and Rudolf Wladyka collect from the Eastside Building Materials Co., Inc., for the transportation performed for it on behalf of the Eastside Hauling Co., Inc., the difference between what they received for such transportation and the minimum rates applicable thereto.

IT IS FURTHER ORDERED that the Secretary of the Railroad Commission is directed to cause personal service of a certified copy of this decision to be made upon each of said respondents, Eastside Building Materials Co., Inc., Eastside Hauling Co., Inc., William N. Nichol, Arthur James and Rudolf Wladyka.

The effective date of this order shall be twenty (20) days after the date of service thereof upon said respondents.

The foregoing opinion and order are hereby approved and ordered filed as the opinion and order of the Railroad Commission of the State of California.

Dated at San Francisco, California, this 12th day of May, 1942.

COMMISSIONERS