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Decision No. 51619

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of DIRECT DELIVERY SYSTEM, LTD., for authority to assess less than minimum rates.	)))))	Application No. 35927

H. J. Bischoff, for applicant.
Arlo D. Poe, J. C. Kaspar and R. D. Boynton, for California Trucking Associations, Inc., interested party.
Harold J. McCarthy and Grant L. Malquist, for the staff of the Public Utilities Commission of the State of California.

OPINION AND ORDER ON REHEARING

By this application, as amended, Direct Delivery System, Ltd., a California corporation, seeks authority to assess lower and different rates for transportation which it performs for the Rheingold Brewing Company than the rates which apply as minima under the provisions of Minimum Rate Tariff No. 2.

A public hearing having been held, this Commission, by Decision No. 50924, dated December 30, 1954, denied said application. The denial was based on findings that applicant, a duly authorized highway contract carrier, and Southern California Freight Lines, a California corporation and a certificated highway common carrier, are the alter ego of each other; that rates sought to be established on behalf of applicant are substantially different from and generally less than those maintained for the same service by Southern California Freight Lines; that the granting of applicant's request would authorize the alter ego of a highway common carrier to perform a transportation service for a selected shipper at rates different from those maintained in the common carrier tariff for

application to the public generally; and that such a departure is unlawful and violates the provisions of Sections 453, 532 and 3542 of the Public Utilities Code.

Applicant petitioned for a rehearing on the grounds (1) that the Commission failed to make a finding as to the reasonableness of the proposed lesser rate, (2) that the finding that the proposed rate is unlawful is not supported by the evidence, and (3) that the finding that applicant corporation is the alter ego of Southern California Freight Lines is not supported by the evidence.

Applicant's petition for rehearing was granted in order to more fully develop and explore facts relative to the misuse, if any, of the fiction of separate corporate existence.

A public rehearing was held at Los Angeles before Commissioner Ray E. Untereiner and Examiner Mark V. Chiesa, and additional oral and documentary evidence having been adduced, the matter was again submitted for decision.

At the rehearing H. J. Bischoff, applicant's president and attorney, testified on cross-examination concerning the ownership, control, management and business of Direct Delivery System, Ltd., Southern California Freight Lines and several other affiliated corporations. Four additional exhibits were received: a copy of applicant's Articles of Incorporation, its balance sheet as of December 31, 1954, a letter showing stock ownership of the directors of Southern California Freight Lines, Ltd., a California corporation which is the parent holding corporation of both Direct Delivery System, Ltd., and Southern California Freight Lines, and a certified copy of the Articles of Incorporation of said parent company Southern California Freight Lines, Ltd.

The evidence shows and we find that Southern California Freight Lines, Ltd. was incorporated in this State in July 1930; that it is a holding company owning all of the outstanding shares of Direct Delivery System, Ltd., applicant herein, Southern California Freight Lines and several other California corporations; that the other corporations which are wholly owned by Southern California Freight Lines, Ltd. are Southern California Freight Forwarders, an express corporation and freight forwarder, Boyle & Son, a highway common carrier and household goods permitted carrier, International Express, Inc., and United Truck Service, Inc., both permitted carriers; that California Terminal Company, a California corporation which owns and leases real property, is a wholly owned subsidiary of Southern California Freight Forwarders; that Direct Delivery System, Ltd. was incorporated in May of 1930 and for many years has been operating as a highway contract carrier and city carrier; that Southern California Freight Lines is a California corporation and for many years has been operating as a highway common carrier and as a radial highway common carrier, highway contract carrier and city carrier; that Direct Delivery System, Ltd. and Southern California Freight Lines have the same officers and directors; that H. J. Bischoff is president, Ed Kuerbis is vice president and treasurer, and John W. Frey is secretary of all of said corporations; that the following persons are the officers and directors of Southern California Freight Lines, Ltd.:

H. J. Bischoff, President and Director
Ed Kuerbis, Vice President and Director
H. P. Merry, Vice President and Director
John Colletti, Vice President and Director
R. E. McConnell, Vice President and Director
John Wm. Frey, Secretary and Director
John Hughes, Director

The evidence further shows and we find that Southern California Freight Lines, Ltd., the parent corporation, has

outstanding 150,000 shares of common and 1,569 shares of preferred stock. Of this, H. J. Bischoff owns 28,601 shares of common and 89 shares of preferred stock in his individual capacity; 2,777 shares of common and 8 shares of preferred stock as trustee, a total of 31,378 shares of common and 97 shares of preferred stock; that 30,000 shares of common stock and 90 shares of preferred are owned by Motor Service Corporation, of which H. J.Bischoff owns 90% of the capital stock; that Mutual Investment Corporation, of which H. J. Bischoff and his employee-directors own the controlling interest, owns 32,134 shares of common and 857 shares of preferred stock; that R. E. McConnell, director and vice president, and sister of H. J. Bischoff, owns 8,856 of common and 20 shares of preferred stock; that E. Kuerbis, a vice president and employee, owns 529 shares of common stock; John Colletti, a vice president and employee, owns 200 shares of common stock; that H. J. Bischoff thus owns or controls 93,512 shares of common and 1,044 shares of preferred stock in Southern California Freight Lines, Ltd., and the aforementioned directors own 5,985 shares of common and 20 shares of the preferred stock; that therefore H. J. Bischoff and/or his sister and employee-directors own or control 103,097 shares of the outstanding 150,000 shares of common stock and 1,064 shares of the outstanding 1,569 shares of preferred stock. Mr. Bischoff testified that he has control of and can do whatever he wishes with all of the companies.

We further find that these corporations are operated as a completely integrated unitary transportation system without concern or reference to corporate lines or walls; that business is solicited by the system as a unit, and when secured is allocated to the particular corporation according to an established procedure; that is, if it be advantageous to the system to transport the freight by common carriage, it is turned over to the common carrier

department of the system or, if it be advantageous to the system to transport the freight by contract carriage, it is turned over to the contract carrier department of the system and in like manner with other departments of the system. In his testimony, Mr. Bischoff refers to these several corporations as his contract carrier department and his common carrier department; equipment is interchanged, when required, between these corporations as if they were departments of one corporation; funds are transferred among these corporations as purported loans or advances on open book accounts without any evidence of arm's-length dealings or negotiations and as though these several corporations were one and, in like manner, such transfers of funds are made from the subsidiary corporations to the parent corporation (upstream loans) by mere book entries; no attempt is made to require each of these several corporations to stand on its own financial base, and the procedure followed is to test the financial integrity of the operation by considering the financial condition of the system as a whole; the foregoing financial procedures are controlled by H. J. Bischoff and are subject to his orders and directions; with minor and immaterial exceptions, the same persons are the officers of all of the aforementioned corporations and the same persons are the directors of said corporations and said officers and directors are the same persons; the parent company owns 100% of the stock in the subsidiary corporations; H. J. Bischoff actually exerts domination and control over all of these corporations and the transportation system which they constitute; he is the president of and the attorney for each of said corporations and appears as such in all proceedings before this Commission involving any of said corporations, and generally signs and verifies all pleadings and is the only witness or is the important witness on behalf of said corporations in such proceedings and speaks with complete

authority with regard to their operation and control; since 1938, he has been actually and personally engaged in the supervision of this transportation system; in the instant proceeding, involving applicant herein, Mr. Bischoff spoke with authority on behalf of all the other corporations constituting this transportation system; he admitted his paramount authority over these corporations and failed to point out or name any person or persons who exercised superior or equal authority to his; a single payroll is maintained for all the corporations; these corporations are housed in the same office, have the same telephone, have their books of account, financial records and tax returns prepared and kept by the same office personnel and the business of said corporations is conducted and handled by the same personnel; while an attempt is made to keep separate books of account, such is more apparent than real.

Many other facts and circumstances appear of record tending to show that H. J. Bischoff actually treats said transportation system as one entity and exercises complete domination and control thereover, but the foregoing more than suffices to establish such domination, control and unity.

It is obvious from the foregoing, and we find, that Southern California Freight Lines, Ltd., the holding company, is the parent corporation and alter ego of Southern California Freight Lines, Southern California Freight Forwarders, Boyle & Son, International Express, Inc., United Truck Service, Inc., and California Terminal Company, as well as of the applicant, Direct Delivery System, Ltd.; that Southern California Freight Lines, a highway common carrier, is the alter ego of Southern California Freight Lines, Ltd., and of Direct Delivery System, Ltd., a highway contract carrier; that all of the aforementioned corporations are alter egos one of another; that all of said corporations constitute a completely integrated system. We further find

that H. J. Bischoff operates, manages, controls and owns a controlling interest in and therefore is the alter ego of said Southern California Freight Lines, Ltd., and of applicant, Direct Delivery System, Ltd.

The evidence further shows, and we find, that applicant has a contract with Rheingold Brewing Company for the delivery of bottled malt liquors from the company's brewery at Vernon, California, to its distributors located at Santa Barbara, Ventura, Palmdale, Burbank, Pomona, San Bernardino, Santa Ana, Oceanside and San Diego; that said contract was entered into with Direct Delivery System, Ltd. because the highway common carrier authority of the affiliated corporations does not extend to three of said distribution points, to-wit, Santa Barbara, Ventura and Palmdale, and Mr. Bischoff contends that Direct Delivery System, Ltd. could lawfully perform the transportation service to all nine distribution points; that Southern California Freight Lines publish highway common carrier tariff rates for bottled malt liquors from Vernon to Burbank, Pomona, San Bernardino, Santa Ana, Oceanside and San Diego, six of the nine points for which applicant seeks authority to serve at less than the said published tariff rates.

Section 453 of the Public Utilities Code provides in effect that no public utility shall grant any preference or advantage to any person or corporation. Section 494 provides that no common carrier may charge a different compensation for the transportation of property than the applicable rates and charges specified in its tariff, nor extend to any corporation or person any privilege or facility except such as are regularly and uniformly extended to all corporations and persons. Section 532 of said Code contains provisions similar to the foregoing.

Section 3542 of the Public Utilities Code provides:

> "No person or corporation shall engage or be permitted by the Commission to engage in the transportation

of property on any public highway, both as a common carrier and as a highway contract carrier of the same commodities between the same points."

Applicant, Direct Delivery System, Ltd., being the alter ego of Southern California Freight Lines and the parent corporation, Southern California Freight Lines, Ltd., it is therefore found that the proposed service would be in violation of said Sections 453, 494, 532 and 3542 of the Public Utilities Code.

A common carrier may not engage in private carriage of goods which it is obligated to transport as such common carrier. (N.Y.C. R.R. Co. v. Lockwood, 84 U.S. 357, 377, 21 L. ed. 627, 639; L. & N. R. Co. v. U.S., 106 Fed. Supp. 999, 1008; 13 C.J.S. 32, Sec. 5.)

H. J. Bischoff admits that he could not engage in both common and contract carrier transportation of the same commodities between the same points as an individual. We find that H. J. Bischoff may not be permitted to do this very thing by dividing himself up into a multiplicity of corporate segments and thereby secure to each such segment the same rights and privileges under the law as are enjoyed by separate persons.

The cases cited by applicant in its argument apply to the relationship of private parties or involve taxes and do not relate to matters involving governmental regulation under the police power. Where regulation is the subject matter, all that is required to be shown by the evidence is that one corporation is the alter ego of another corporation or an individual, and that the recognition of separate corporate fiction would result in the evasion, circumvention or frustration of regulatory law. (Western Canal Co. v. Railroad Commission, 216 Cal. 639, 645, 648, cert. den. 289 U.S. 742, 77 L. ed. 1489; Ohio Mining Co. v. Public Utilities Commission, 106 Ohio State 138, 140 N.E. 143, 147; Chicago, etc., Co. v. Minneapolis, 247 U.S. 490, 62 L. ed. 1229; Smith v. Ill. Bell Telep. Co., 282 U.S. 133, 152-153, 75 L. ed. 255, 265; Lindheimer v. Ill.

Bell Telep. Co., 292 U.S. 151, 156-157, 78 L. ed. 1182, 1187; Columbus Gas & Fuel Co. v. Public Utilities Commission, 292 U.S. 398, 400-401, 78 L. ed. 1327, 1329; Western Distributing Co. v. Public Service Commission, 285 U.S. 119, 124-127, 76 L. ed. 655, 658-659.) However, the cases cited by applicant establish no different legal rule than do the foregoing cited cases, the objective of the law being to prevent an inequity, injustice, violation of law or contravention of public policy.

Those cases involving taxes cited by applicant, particularly in Cal. Motor, etc. v. State Bd. of Equal., 31 C. (2d) 217, 223, held that " 'Persons may adopt any lawful means for the lessening of the burden of taxes which in one form or another may be laid upon properties or profits (Pioneer Express Co. v. Riley, 208 Cal. 667, 687 [284 P. 663])' ". Such rule, however, has no application in the matter of state regulation under the police power.

The case of Schenley Dist. Corp. v. U.S., 326 U.S. 432, 437, 90 L. ed. 181, 184, holds that while corporate entities may not be disregarded by those who have deliberately adopted the corporate form to secure its advantages, and where no violence is done to the legislative purpose by treating the corporate entity as a separate legal person, such corporate entities may be disregarded where they are made the implement for avoiding a clear legislative purpose.

In the Smith case (supra), the United States Supreme Court held that it would be unjust and inequitable for the dealings between affiliated corporations subject to regulation to be treated as though they were dealings between separate individuals.

The vice inherent in the corporate combination involved herein is that such combination seeks to evade and violate the regulatory law of this State by using corporate forms to cover up the real identity of the person who, in fact and in law, owns, dominates, controls and operates the transportation system involved.

Such conduct constitutes an injustice to the public in that preferences would be allowed to or withheld from certain shippers. The wrong, inequity or injustice with which the regulatory law is concerned in cases of this kind is the employment of separate corporate entities for the purpose of evading and violating the regulatory statute here involved, that is, the carriage by a person both as a common and as a contract carrier of the same commodity between the same points. In law and in fact, it is found that the operation here involved is no different than were it an individual proprietorship owned and operated by H. J. Bischoff as an individual.

We hereby further find from the evidence that Southern California Freight Lines, a highway common carrier, maintains rates and services for the transportation of the commodities involved in this proceeding from Vernon, on the one hand, to Burbank, Pomona, San Bernardino, Santa Ana, Oceanside and San Diego; that the rates herein sought to be established on behalf of Direct Delivery System, Ltd. for Rheingold Brewing Company to the aforementioned points are substantially different from and generally less than those maintained for the public generally for the same service between the same points by said Southern California Freight Lines and are therefore preferential and discriminatory.

Should Southern California Freight Lines' tariff rates be deemed to be unreasonable or excessive for particular services, relief may be obtained by lawful means and procedures. Southern California Freight Lines or the shipper involved may propose directly whatever reductions or other changes they may consider necessary.

With respect to that portion of the transportation sought to be performed at less than the minimum rates between Vernon, on the one hand, and Palmdale, Santa Barbara and Ventura on the other, the record shows that neither Southern California Freight Lines

nor any of the affiliates has highway common carrier authority to serve these points. Denial of the present application will be without prejudice to consideration of any proposal which applicant may make with respect to rates for transportation between such points.

O R D E R

Based upon the evidence of record in the above-numbered proceeding and upon the conclusions and findings contained in the preceding opinion,

IT IS HEREBY ORDERED that this application be and it is hereby denied without prejudice to consideration of any proposal which Direct Delivery System, Ltd., may make with respect to rates for transportation between points not served by Southern California Freight Lines.

This order shall become effective twenty days after the date hereof.

Dated at San Francisco, California, this 28th day of June, 1955.

President

Commissioners