

ORIGINAL

Decision No. 57341

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own	}	Case No. 6016
motion into the operations, practices,		
rates, charges and contracts of		
SOUTHERN CALIFORNIA LUMBER TRANSPORT,		
a corporation.		

Marvin Handler, for the respondent.
W. C. Bricca, for the Commission staff.

O P I N I O N

On December 3, 1957, the Commission issued an order instituting an investigation into the operations, rates, practices, charges, and contracts of Southern California Lumber Transport, a corporation. This order alleged that all or substantially all of the respondent's transportation of property is performed for the Ed Fountain Lumber Company, a partnership; that the actual transportation of the shipments for this company is accomplished by carriers other than the respondent; that the respondent assesses and collects the charges prescribed by the Commission's Minimum Rate Tariff No. 2 for the transportation of the shipments; that the respondent pays to the other carriers amounts less than those prescribed by Minimum Rate Tariff No. 2 for the transportation of the shipments; that the respondent and Ed Fountain Lumber Company may be so united in interest, management and ownership that the fiction of the respondent's corporate entity should be disregarded; and that the respondent may be in fact a device whereby the Ed Fountain Lumber Company obtains the transportation of its property at rates less than those prescribed by Minimum Rate Tariff No. 2. The order was issued for the purpose

of determining whether the respondent is a device whereby the transportation of property between points within this State is being performed for the Ed Fountain Lumber Company for amounts less than those prescribed in Minimum Rate Tariff No. 2.

Public hearings were held February 26, 1958, and March 18, 1958, at San Francisco. On March 18, 1958, the matter was submitted subject to the filing of briefs. These briefs have been filed and the matter is ready for decision.

Facts

Based upon the evidence introduced into the record, the Commission hereby finds that the following facts exist:

1. The respondent is a California corporation which was organized in June, 1956. On July 3, 1956, the Commission issued highway contract carrier permit No. 19-47621 to the respondent, which permit has been in force up until the present time.

2. The respondent has issued 750 shares of stock all of which are of the same class. These shares of stock are all outstanding as of the present time and are held by the following persons in the amounts indicated:

Dale E. Burns	450 shares
Doyle W. Bader	75 shares
Rex E. Fountain	75 shares
Carl Meyers	75 shares
Allan B. Young	75 shares

3. The respondent's officers are Dale E. Burns, president; Ralph Kramer, vice-president; and Carl Meyers, secretary-treasurer. These three officers are also the sole directors of the corporation.

4. The Ed Fountain Lumber Company is a partnership. The persons comprising this partnership together with their respective interests in the partnership are set forth below:

Rex E. Fountain	67% interest
Carl Meyers	5% interest
Dale E. Burns	12½% interest
Doyle W. Bader	12½% interest
Allan B. Young	3% interest

5. Respondent has a small office and terminal at West Sacramento which has suitable equipment for loading and unloading trucks. Respondent also has two other offices, one located in Redding and one located at 6218 South Hooper Avenue in Los Angeles. The head office of the Ed Fountain Lumber Company is also located at 6218 South Hooper Avenue in Los Angeles. All of the transportation and accounting records of the respondent are prepared, maintained, and filed at the office at 6218 South Hooper Avenue. On the respondent's principal freight bill, the only address shown is the 6218 South Hooper Avenue address. However, on the respondent's shipping order, which is only used for shipments passing through the West Sacramento terminal, the Los Angeles and West Sacramento addresses are both shown.

6. Generally, the respondent transports property only for the Ed Fountain Lumber Company. The only exception is that in certain instances the respondent transports lumber which has been purchased from the Ed Fountain Lumber Company by one of the lumber company's customers and the customer pays the freight charges.

7. The respondent owns and operates one tractor. The tractor and its driver are stationed in Redding.

8. Generally, on shipments which originate in the Redding-Sacramento Valley area destined to the Southern California area, respondent's one unit of equipment is used to transport the shipment from point of origin to respondent's West Sacramento terminal. The shipment is then transferred to another carrier, who, acting as a subhauler, transports it the remainder of the distance to point of destination. In some instances shipments originating in the same area are handled the entire distance from point of origin to point of destination by carriers other than respondent. On shipments which originate in the northern coastal area of California destined for Southern California, carriers other than respondent transport the

property as subhaulers the entire distance from point of origin to point of destination.

9. Approximately 95 per cent of all of the shipments handled by respondent are transported the entire distance from point of origin to point of destination by carriers, other than respondent, acting as subhaulers. The remaining 5 per cent of all the shipments transported by respondent are transported part of the way by respondent's one unit of equipment and part of the way by other carriers acting as subhaulers.

10. For the transportation in question, respondent assesses and collects from the partnership lumber company, amounts equal to or in excess of the minimum charges prescribed by the Commission in its Minimum Rate Tariff No. 2. Generally, however, the amounts paid by respondent to the other carriers for the transportation they perform, are less than those minimum charges.

11. During each of the six quarters from July 1, 1956, through December 31, 1957, respondent has engaged from 36 to 45 carriers to act as subhaulers.

12. At the time of the hearings in this matter, there were seven persons employed by the respondent. Dale E. Burns, the president, supervises the operations of the respondent and dispatches respondent's one unit of equipment out of Redding. He operates out of Redding and receives a salary of \$850 per month. He spends about one week of each month in Los Angeles. Ralph Kramer, the vice-president, receives a salary of \$600 per month. He operates as dispatcher and terminal manager at West Sacramento. A driver is employed for respondent's one unit of equipment. He operates out of Redding. An assistant dispatcher is employed at the terminal at West Sacramento. A woman dispatcher and a woman billing clerk are

employed at the office in Los Angeles. Both of these employees are also employed part of the time by the partnership lumber company. Half of the salary paid to both of these employees is paid by the respondent and the other half is paid by the partnership lumber company. Allan Young is also hired as an employee of respondent operating out of Los Angeles. He supervises the local hauling by respondent hereinbelow described in paragraph 21, for which services he receives a salary from respondent. All of the dispatching for shipments other than those originating in the Redding-Sacramento Valley area is performed by the respondent's employees in the Los Angeles office. The majority of shipments handled originate at points other than the Redding-Sacramento Valley area.

13. Carl Meyers performs services for the respondent as an independent public accountant and not as an employee. He operates out of the Los Angeles office and he supervises the rating, billing, and dispatching functions as well as maintaining the respondent's records. During the last year he received from five to six thousand dollars from the respondent for his services.

14. With respect to the partnership lumber company, certain partners receive sums from the partnership in the form of salaries in addition to their percentage portion of the partnership profits. The partners who receive such salaries are Rex E. Fountain, Doyle W. Bader, and Allan B. Young. Dale E. Burns does not receive such a salary. Carl Meyers also handles the accounting work for the partnership lumber company. He is either paid a salary or receives compensation from the partnership lumber company as an independent public accountant.

15. Dale E. Burns devotes at least 20 per cent of his time to the business of the partnership lumber company. He represents the

partnership lumber company in negotiating with the various lumber mills relative to the purchase of lumber. He receives an expense account from the respondent and also from the partnership lumber company. The rent for the office space used by him in Redding is paid entirely by the partnership lumber company.

16. For the fiscal year ending January 31, 1957, Dale E. Burns received no return whatsoever from his interest in the partnership. For the fiscal year ending January 31, 1958, Mr. Burns' return from his partnership interest amounted to several thousand dollars.

17. The respondent's bank accounts, accounting records, and insurance policies are maintained separate from those of the partnership lumber company. The respondent pays all taxes and fees required to be paid to the State Board of Equalization and the Commission for the transportation in question and also all Federal transportation taxes.

18. The records of both the respondent and the partnership lumber company are maintained on a fiscal year ending January 31.

19. Since its inception, the respondent has accumulated approximately \$40,000 in earned surplus. The respondent's profits are derived principally from the difference between the amounts it receives from the partnership lumber company for the transportation in question and the amounts it pays to other carriers acting as sub-haulers. The respondent was originally incorporated with a capitalization of \$7,500. This amount has not changed. The respondent has paid no dividends to stockholders since its incorporation.

20. The respondent has not had any formal corporate meetings since it was organized. Informal meetings are frequently held, however, at which time matters of policy are discussed.

21. The respondent also performs local hauling for the partnership lumber company in the Los Angeles area. All of this hauling is physically performed by another carrier acting as a subhauler.

22. The carriers engaged by the respondent are paid by it at the Los Angeles office.

23. Respondent's freight bills are prepared in the Los Angeles office and are paid by the Ed Fountain Lumber Company in the Los Angeles office.

24. Ralph Kramer, the respondent's vice-president who is not a partner of the Ed Fountain Lumber Company, has signed shipping orders on behalf of the Ed Fountain Lumber Company.

Positions of the Parties

It is the position of the Commission staff that the relationship between the respondent and the partnership lumber company is such that they are in fact one and the same and that respondent's corporate identity must be disregarded. It is the position of the staff that since the partnership lumber company and the respondent are one and the same, the other carriers who purportedly are sub-haulers of the respondent, are in fact prime carriers for the partnership lumber company. The staff maintains that for this reason and inasmuch as the other carriers are receiving less than the minimum charges prescribed by the Commission, the partnership lumber company is receiving the transportation of its property at less than the minimum charges in violation of law.

The respondent maintains that it is a separate corporate entity, completely separate and apart from the partnership lumber company and that inasmuch as it charges and collects from the partnership lumber company, amounts equal to or in excess of the minimum charges prescribed by the Commission, the Commission staff's position is unfounded.

In view of their respective positions, the questions to be decided by the Commission are:

(1) Whether the relationship between the respondent and the partnership lumber company is such that the separate identity of the respondent is to be disregarded with the result that the partnership and the respondent are to be considered as one and the same?

(2) If the first question is answered in the affirmative, whether this results in a device or means whereby the partnership lumber company obtains the transportation of property at less than the minimum charges established by the Commission?

Unity of Interest and Ownership

The California Supreme Court decisions have indicated that the conditions under which the corporate entity may be disregarded, or the corporation regarded as the alter ego of the stockholders, necessarily vary according to the circumstances in each case and that only general rules may be laid down for guidance Stark v. Coker, 20 C 2d 839 (1942). The Court decisions have indicated that two requirements are needed for application of the doctrine the first of which is that there be such unity of interest or ownership that the separate personalities of the corporation and the shareholder no longer exist. While the majority of cases where the doctrine has been invoked have involved situations where the corporation was owned by a single shareholder, the doctrine has also been invoked in a situation involving a corporation and a partnership where all of the stockholders of the corporation were members of the partnership Gordon v. Aztec Brewing Co., 33 C 2d 514 (1949).

With respect to the present matter, an examination of the facts found indicate that the members of the partnership lumber company are the only shareholders of the respondent and that for the

most part the partnership lumber company is the only customer of the respondent. The facts indicate that only three of the seven employees of the respondent, to wit, the driver and the dispatcher and assistant dispatcher at West Sacramento, are not also employed by or devote time to the partnership lumber company. The facts indicate that the principal office of the partnership lumber company in Los Angeles is also one of the offices of the respondent and that the bills from the respondent to the partnership lumber company, the payments to the other carriers involved, and the respondent's books of account are prepared, made, or maintained in this office by or under the supervision of the person who is the accountant for both the partnership lumber company and the respondent and who is also a partner and a shareholder. The facts also indicate that respondent's president operates out of an office in Redding rather than the offices at West Sacramento or Los Angeles, that he devotes a portion of his time to both the partnership lumber company and the respondent but that the entire rent for the office in Redding is paid by the partnership lumber company. With respect to the respondent's method of operation, the facts indicate that approximately 95 per cent of the shipments purportedly transported by the respondent are in fact transported entirely by other carriers and that other carriers transport the remaining 5 per cent of the shipments a portion of the distance to their respective points of destination. Also to be noted is the fact that Dale Burns, the majority shareholder in the corporation, is the only partner who does not receive sums from the partnership in addition to his percentage interest in the partnership profits notwithstanding the fact that he devotes a substantial portion of his time to the business of the partnership. In view of these facts as well as the other facts hereinabove found, it

would appear that the requirement of unity of interest and ownership has been met and that the separate personalities of the corporation and the partnership do not exist.

The respondent points out, however, what it considers an important and distinguishing element in this case which is that each partner's proportionate interest in the partnership is different from his proportionate interest in the corporation; that one of the partners who has a minority interest in the partnership has a controlling interest in the corporation; and that the partner with the controlling interest in the partnership is but a minority shareholder in the corporation. The respondent maintains that because of these facts, there is no unity of interest or ownership between the partnership and the corporation.

There does not appear to be any California Supreme Court decision specifically passing upon this point. In this regard it is to be noted that the facts in the Gordon decision, hereinabove referred to, indicate that each partner's proportionate interest in the partnership in that case was the same as his proportionate interest in the corporation.

It appears to the Commission from the facts found in this case, however, that the persons involved in this matter are acting as a group and not individually. When considered as a group these persons not only comprise the entire partnership but also are the sole shareholders of the corporation. When these persons are considered as a group it appears clear that there is such unity of interest and ownership that the separate personalities of the partnership and the corporation do not exist. It is the Commission's opinion that under the facts found, the persons involved must be considered as a group and to do otherwise would be unrealistic and give credence to form rather than substance.

The Commission hereby finds and concludes that there exists between the partnership lumber company and the respondent such unity of interest and ownership that the separate personalities of either do not exist.

Evasion of Law

An examination of the Supreme Court decisions indicates that a second requirement must also be met before the separate corporate entity will be disregarded.

This requirement appears to vary depending upon the case involved. This Commission has indicated in a prior decision that this second requirement is met when the recognition of the separate corporate fiction would result in the evasion, circumvention, or frustration of regulatory law. Application of Direct Delivery System, Dec. No. 51619 in Application No. 35927, 54 CPUC 258. The California Supreme Court in its decisions has stated that the corporate entity may be disregarded when it is used to evade the law. H.A.S. Loan Service v. McColgan, 21 C 2d 518 (1943).

With respect to the present case, if respondent's separate corporate entity is disregarded, the carriers actually transporting the shipments become prime carriers of the partnership lumber company and are required by the Public Utilities Code to assess and collect the minimum charges established by the Commission for the transportation in question. It is clear from the evidence that the respondent is being used for the purpose of allowing these other carriers to collect less than the established minimum charges for the transportation they perform. It follows, therefore, that the corporation is being used to evade and circumvent those provisions of the Public Utilities Code which require that no less than the minimum charges established by the Commission be assessed and collected by the carrier for the transportation performed.

The Commission hereby finds and concludes that the second requirement necessary for disregarding respondent's separate corporate entity has been met and that the continued recognition of the respondent as a separate corporate entity results in the evasion and circumvention of the provisions of the Public Utilities Code.

Conclusions

It is the Commission's conclusion that respondent's separate corporate entity should be disregarded. In view of this conclusion it is clear that with respect to shipments transported for the partnership lumber company, the designation of respondent as the prime carrier is incorrect.

The Commission finds and concludes that the respondent and the resulting incorrect designation of prime carrier constitute a device and means whereby the partnership lumber company obtains the transportation of property at less than the minimum charges established by the Commission. It is also the Commission's conclusion that such a device and means is prohibited by Section 3669 of the Public Utilities Code.

It is also the Commission's conclusion that the respondent's highway contract carrier permit should not be revoked. It will, however, be amended by inserting therein a restriction which prohibits the respondent, whenever it engages other carriers for the transportation of the property of the partnership lumber company, or of customers of the partnership lumber company from paying such other carriers less than the minimum charges established by the Commission for the transportation actually performed by such other carriers.

Motion

During the hearings in this matter, respondent moved that the Commission investigation be dismissed. This motion is denied. The respondent has also petitioned for an examiner's proposed report. This petition has been denied.

ORDER

A public hearing having been held in the above-entitled matter and the Commission being fully informed therein, now therefore,

IT IS ORDERED:

1. That on the effective date of this decision, the Secretary of the Commission is directed to cause to be amended, highway contract carrier permit No. 19-47621 issued to Southern California Lumber Transport by inserting therein a restriction prohibiting Southern California Lumber Transport, whenever it engages other carriers for the transportation of the property of the Ed Fountain Lumber Company, or of customers of the Ed Fountain Lumber Company, from paying such other carriers less than the minimum charges established by the Commission for the transportation actually performed by such other carriers.

2. That the Secretary of the Commission is directed to cause personal service of this decision to be made on Southern California Lumber Transport, a corporation, and this decision shall become effective twenty days after the date of such service.

Dated at San Francisco, California, this 15th day of September, 1958.

[Signature]
President
[Signature]
[Signature]
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Commissioners