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Decision No. 69084

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own motion into the operations, rates and practices of MacDONALD & DORSA TRANSPORTATION COMPANY, a corporation, L. J. CIRAULO, JIM COLE, DAVID BEEBE, BURYL BARTON, and JOHN RECOTTA.	Case No. 7736

Marquam C. George & E. H. Griffiths, for MacDonald & Dorsa Transportation Company.
Donald B. Day, for the Commission staff.

O P I N I O N

By its order dated October 1, 1963, the Commission instituted an investigation into the operations, rates and practices of MacDonald & Dorsa Transportation Company (MacDonald & Dorsa), a corporation, L. J. Ciraulo, Jim Cole, David Beebe, Buryl Barton, and John Recotta. Public hearings were held before Examiner Daly on December 10, 1963 and January 31, 1964, at San Francisco and the matter was submitted subject to the receipt of briefs, which have since been filed.

Respondent MacDonald & Dorsa is an affiliate of Santa Clara Sand and Gravel Co., Inc. (Sand and Gravel) and provides transportation for the parent company and others through the use of subhaulers, including respondents Ciraulo, Cole, Beebe, Barton and Recotta. MacDonald & Dorsa leases 65 sets of bottom dump trailers from Sand and Gravel and then in turn leases them to subhaulers. Pursuant to a written agreement MacDonald & Dorsa pays to the parent company a rental equal to 30½ percent of the gross revenue derived from the subleases. Under the subleases there is an agreed rental of 33-1/3 percent 1/ of the total gross revenue earned or received by the

1/ The written agreements (Exhibit 11) actually provide for higher percentages, but apparently only 33-1/3 percent has been charged.

subhaulers as the result of transportation performed by said equipment.

A representative of the Commission's Field Section visited MacDonald & Dorsa's place of business and checked its records.

The underlying documents relating to 13 shipments were taken from respondent's files and submitted to the License and Compliance Branch of the Commission's Transportation Division. Based upon data taken from said shipping documents, a rate study was prepared and introduced into evidence as Exhibit 16. Said exhibit indicates that in all cases except one MacDonald & Dorsa paid the subhaulers 100 percent of the applicable minimum rates and that in the one exceptional instance MacDonald & Dorsa paid more than the applicable minimum rates.

During the course of the hearing, the staff undertook to prove that:

> (1) The alleged subhaulers are in reality prime carriers when transporting the shipments of Sand and Gravel, and any deductions from the transportation charges for rental equipment constituted a violation of Sections 3668, 3669 and 3737 of the Public Utilities Code.
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> (2) In connection with transportation performed for other shippers, respondent MacDonald & Dorsa violated Public Utilities Code Sections 3668 and 3737 by means of a device, referred to as a trailer rental arrangement, which resulted in excessive and unreasonable deductions from payments to subhaulers in violation of Item 94-C of Minimum Rate Tariff No. 7 (MRT 7).
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> (3) Respondent MacDonald & Dorsa violated Section 3737 of the Public Utilities Code in failing to comply with Note 2 of Item 94-C of MRT 7 by making improper and unauthorized deductions from payments to subhaulers.

The record indicates that Sand and Gravel operates sand and gravel plants in the Santa Clara Valley and Scotts Valley. The main office is in Santa Clara. Mr. Steve Dorsa and Mr. Arch MacDonald are president and secretary, respectively, of both Sand and Gravel and MacDonald & Dorsa. The stock of each company is owned

50 percent by Mr. MacDonald and 50 percent by Mr. Dorsa. Both companies share the same office space in Santa Clara. Sand and Gravel owns all of the trailers and provides for their maintenance and repair. All office work for MacDonald & Dorsa is performed by employees of the parent company, for which MacDonald & Dorsa is billed on a monthly basis. Approximately one-third of MacDonald & Dorsa's total operation is performed for Sand and Gravel.

Each trailer unit has an original cost of approximately $12,000 and is depreciated over a period of eight years. Respondent subhaulers each paid approximately $8,000 to MacDonald & Dorsa for trailer rentals during the year 1962. The names of the respondent subhaulers were provided to the staff representative by an employee of Sand and Gravel who represented them as being typical of the subhaulers used by McDonald & Dorsa on a year-round basis.

The staff contends that Sand and Gravel and MacDonald & Dorsa are so interconnected that, when subhaulers are used to transport the property of Sand and Gravel, the subhaulers are in fact prime carriers. The staff further contends that the 33-1/3 percent deduction from the gross operating revenue earned by subhaulers enables Sand and Gravel, through its alter ego, to recover in less than two years an amount equal to the original cost of the equipment and that such an amount is excessive. The staff therefore argues that the deduction is an unlawful device by which Sand and Gravel obtains transportation at less than the minimum rates.

With respect to transportation performed for shippers other than Sand and Gravel the staff recognizes that deductions from

subhauler payments may be made provided they are in accordance with Item 94-C of MRT 7.[2/] The staff argues, however, that an overlying carrier may deduct from an underlying carrier only "such liquidated amounts as may be due from the underlying carrier ..., providing such deductions have been authorized in writing by the underlying carrier." (Emphasis added.) The only written authorization for the rental deduction is contained in a standard subhaul agreement which is executed by each subhauler (Exhibit 10). The staff argues that the subhaul agreements do not comply with Note 2 of Item 94-C in that the amount to be deducted must be due and liquidated, whereas a blanket authorization to make deductions for future shipments deals with indefinite and uncertain amounts.

An appearance was made on behalf of respondent MacDonald & Dorsa only. No affirmative presentation was offered. Counsel for MacDonald & Dorsa made a motion to dismiss on the ground that the staff had failed to make a case.

2/ "PAYMENTS TO UNDERLYING CARRIERS.

"Charges paid by any overlying carrier to an underlying carrier and collected by the latter carrier from the former for the service of said underlying carrier shall be not less than 95 percent of the charges applicable under the minimum rates prescribed in this tariff, less the gross revenue taxes applicable and required to be paid by the overlying carrier. (See Notes 1 and 2).

'NOTE 1. - As used in this item the term gross revenue taxes means the California Transportation Tax payable to the California Board of Equalization and the tax payable to the California Public Utilities Commission under the Transportation Rate Fund Act.

'NOTE 2. - Nothing herein contained shall prevent an overlying carrier, in paying such charges, from deducting therefrom such liquidated amounts as may be due from the underlying carrier to the overlying carrier, providing such deductions have been authorized in writing by the underlying carrier. Any overlying carrier electing to employ this procedure shall itemize such amounts and maintain for the Commission's inspection all documents involved in the transaction."

Discussion

The staff's contentions must be sustained.

(1) MacDonald & Dorsa is the alter ego of Sand and Gravel. The evidence clearly shows their common ownership and control; stock in both companies is held in the same proportion, the president and secretary of both are the same, they have the same address, and Sand and Gravel employees do all of MacDonald & Dorsa's work, MacDonald & Dorsa having no employees of its own. It is true, as respondent points out, that the alter ego doctrine requires, in addition to common ownership and control, that there exist an element of fraud or injustice, but under the circumstances of this case, injustice is inherent. Item 94-C of MRT 7 authorizes deductions only in the case of subhauling. It is a tariff provision specially tailored to the relationship between prime carriers and subhaulers; it is not applicable, and is not appropriate, to the altogether different relationship between shippers and prime carriers. No deductions such as that authorized by Item 94-C may be made by a shipper in connection with tariff charges due a prime carrier. When handling shipments for Sand and Gravel, MacDonald & Dorsa is in reality no more than a shipping department of its affiliate; it is not an independent intermediary between that shipper and the actual carriers. Without the fiction of MacDonald & Dorsa's independent existence, Sand and Gravel could not rely on Item 94-C, for the other carriers would be prime carriers. Since it would be inequitable to permit Sand and Gravel, by means of that fiction, to gain an advantage otherwise prohibited by law, the alter ego doctrine is applicable. The alleged subhaulers should be treated as prime carriers when shipments for Sand and Gravel are involved.

We attach no significance to the fact that separate records were kept by these two companies. While commingling of their records might be regarded as an aggravation, the mere failure to commingle does not alter the impropriety of using the fiction of separate identities as a device for paying less than the minimum rates. Neither is it significant that Sand and Gravel is not, as such, a formal party to these proceedings. It is adequately represented through its alter ego, MacDonald & Dorsa. (See Pratt v. Coast Trucking, 228 Adv.Cal.App. 159, 173, 678.)

(2) The alleged trailer rental is a device by which MacDonald & Dorsa has evaded payment of the amounts otherwise due the subhauler respondents under MRT 7. When transporting the goods of shippers other than Sand and Gravel, MacDonald & Dorsa may act as a prime carrier, and therefore only 95 percent of the minimum rates is due the other respondents as subhaulers. However, the arrangements by which trailers are leased to the subhaulers at an unreasonable rental has wholly frustrated the 95 percent requirement. The rental is expressly made dependent on gross revenues, and with respect to these five subhauler respondents (admittedly representative of those whose services were used by MacDonald & Dorsa on a full-year basis), the rental for each trailer in 1962 was approximately $8,000. The original price of the trailers was approximately $12,000, and they are being depreciated by MacDonald & Dorsa on the basis of an eight-year life. The amount of rental is manifestly excessive.

It is true that in all the transactions covered by Exhibit 16 and involving unaffiliated shippers, MacDonald & Dorsa paid the subhaulers 100 percent of the applicable minimum rates (subject to the trailer rental deduction), whereas only 95 percent was required by Item 94-C. But this margin of 5 percent merely reduces - it does not eliminate - the unlawful effect of the excessive rental. Even

allowing for the amount paid in excess of 95 percent of the minimum rates, we find that the amount of the rental deduction was unreasonable and resulted in payments to the subhaulers which were below the minimum lawful amounts.

The purpose of the trailer rental as a device to circumvent the minimum rates is illuminated by the change which MacDonald & Dorsa made in the specific percentage of gross revenue used as the measure of the rental. The circumstances are summarized in respondent's opening brief (pages 3-4) as follows:

> "...In 1958 the Commission investigated the carrier and found that the trailer rental being charged the sub-haulers was 28-1/2%* and a deduction of 5% for bookkeeping and like services. It was the opinion of the Commission's representatives that the deduction of the 5% when transporting the property of Santa Clara Sand and Gravel would result in an underpayment to the sub-haulers. Accordingly at the instance and suggestion of the staff, the 5% bookkeeping charge was eliminated and the trailer rental was raised to 33-1/3%."
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> *(The figure 28-1/2% appears to be a typographical error in the brief. The testimony indicates it was 28-1/3%. Reporter's Transcript, page 82.)

Respondent's attempt to maintain the total deduction at the same level as before the staff's criticism of the 5 percent charge for bookkeeping is transparent. It is also evident how readily any prime carrier could circumvent the 95 percent requirement of Item 94-C if he were free to use any amount at all as trailer rental.

It is not material that Item 94-C itself makes no reference to reasonableness. Section 3668 of the Public Utilities Code expressly condemns any "device" by which transportation is provided at less than the minimum rates; the deliberate use of an excessive and unreasonable rental is such a device.

Respondent's objection that the Commission had no jurisdiction over leasing until 1963 (Public Utilities Code Sections 3547 and 3548) is not valid. Our scrutiny of these transactions is not

based on the incidental fact that they have involved leases; we are concerned solely because these rental arrangements have been used as a device to evade the minimum rates.

(3) The trailer rental deductions are unlawful for the further reason that, even if reasonable, they are not authorized by MRT 7. Note 2 of Item 94-C requires that such deductions be authorized in writing and that they be "liquidated". In no sense were these obligations liquidated. At the time the rental agreements were signed (that is, at the time of the written authorization of the deductions), the amount of the rental to be paid was wholly speculative, being contingent upon the future gross revenues associated with each trailer.

MacDonald & Dorsa argues in its reply brief that, inasmuch as the other five respondents performed services for MacDonald & Dorsa on a full-time basis, they should be regarded as employees rather than subhaulers. MacDonald & Dorsa did not so treat them at the time the services were performed, nor was this argument urged at the hearing or in respondents' opening brief. The suggestion is obviously an afterthought. Trailer equipment is not customarily "leased" to employee truck drivers, and their "wages" are not customarily computed in the manner revealed here. Moreover, performance of services on a full-time basis is entirely consistent with subhauler status; there can be full-time independent contractors just as there can be part-time employees.

(4) The staff did not attempt to establish any particular trailer rental which might be considered reasonable. At least on this record, therefore, we cannot calculate the undercharges which would be due the subhaulers. The order herein will not contain the usual direction that undercharges be collected. However, in light of the aggravated circumstances disclosed, a fine will be imposed.

(5) Respondent contends that there has been no proof of service of MRT 7. An examination of the transcript, however, reveals an

adequate showing in this respect. Thus, the staff witness testified that when he asked at the carrier's office for the tariff that had been served upon MacDonald & Dorsa, a copy of MRT 7 was produced; the witness found it up to date with respect to the rates which are pertinent to MacDonald & Dorsa. He also testified that Mr. Dorsa, the president, admitted he regularly received supplements and corrections from the Commission.

Findings and Conclusions

After consideration, the Commission finds that:

1. MacDonald & Dorsa presently holds permitted authority duly issued by this Commission and has been served with a copy of Minimum Rate Tariff No. 7 and applicable supplements thereto.

2. In the instances set forth in Exhibit 16 (except for Part 2 thereof) MacDonald & Dorsa paid respondent subhaulers exactly 100 percent of the applicable minimum rates for the transportation performed, subject to deductions for alleged trailer rentals.

3. Sand and Gravel is a producer and shipper of sand, gravel and aggregates. MacDonald & Dorsa and Sand and Gravel are under common ownership and control, they have the same place of business, and all office work performed for MacDonald & Dorsa is done by employees of Sand and Gravel. MacDonald & Dorsa has no employees and neither owns nor operates any equipment.

4. MacDonald & Dorsa leases 65 bottom dump trailers from Sand and Gravel, which it subleases to subhaulers for a rental equal to 33-1/3 percent of the gross revenue derived from the use of said equipment. The initial cost of each of the trailers was approximately $12,000, and each has a service life of approximately eight years. Under said subleases, each subhauler respondent paid to MacDonald & Dorsa as trailer rental in 1962 approximately $8,000.

5. MacDonald & Dorsa is the alter ego of Sand and Gravel. The services of respondent subhaulers (or any other subhaulers) when used

to transport the property of Sand and Gravel are in reality those of prime carriers, and the alleged trailer rental deductions constitute an unlawful device whereby Sand and Gravel obtains transportation at rates less than the minimum in violation of Sections 3668, 3669 and 3737 of the Public Utilities Code, as illustrated by Parts 2 and 11 of Exhibit 16. Minimum Rate Tariff No. 7 contains no authority for a shipper to make any deduction from such transportation charges, whether or not the deduction is reasonable.

6. The blanket authorizations by respondent subhaulers for future trailer rental deductions, contained in the lease agreements with MacDonald & Dorsa, do not comply with the requirements of Note 2 of Item 94-C of Minimum Rate Tariff No. 7, in that said deductions were not liquidated when authorized.

7. The alleged trailer rentals deducted by respondent MacDonald & Dorsa from payments otherwise due in 1962 to the other respondents as subhaulers were excessive and unreasonable and constituted a device whereby respondent MacDonald & Dorsa sought to evade, and did evade, the requirement of this Commission's Minimum Rate Tariff No. 7 that subhaulers be paid not less than 95 percent of the charges applicable under the minimum rates prescribed in said tariff (Item 94-C), all as illustrated by Parts 1 through 13 of Exhibit 16 (except Parts 2 and 11 thereof).

We conclude that respondent MacDonald & Dorsa has violated the requirements of Item 94-C of this Commission's Minimum Rate Tariff No. 7, has violated Sections 3668, 3669 and 3737 of the Public Utilities Code, should be ordered to cease and desist from committing such violations, and should pay a fine to this Commission of two thousand five hundred dollars ($2,500). We also conclude that the motion to dismiss should be denied.

O R D E R

IT IS ORDERED that:

1. When transporting the property of Santa Clara Sand and Gravel Co., Inc. through the use of other carriers, MacDonald & Dorsa Transportation Company shall henceforth cease and desist from deducting trailer rental charges from the charges paid to such other carriers.

2. When transporting the property of shippers other than Santa Clara Sand and Gravel Co., Inc. through the use of subhaulers, MacDonald & Dorsa Transportation Company shall henceforth cease and desist from deducting trailer rental charges from the charges paid to said subhaulers unless such deductions comply with the requirements of Note 2 of Item 94-C of Minimum Rate Tariff No. 7, as hereinabove discussed.

3. Respondent MacDonald & Dorsa Transportation Company shall henceforth cease and desist from using excessive trailer rental deductions as a device to evade the requirement of this Commission's Minimum Rate Tariff No. 7 that subhaulers be paid not less than 95 percent of the charges applicable under the minimum rates prescribed in said tariff. (Item 94-C.)

4. On the effective date of this decision the Secretary of this Commission shall cause to be amended Radial Highway Common Carrier Permit No. 43-4812 and City Carrier Permit No. 43-4813 issued to MacDonald & Dorsa Transportation Company to provide that said respondent, whenever it engages other carriers in connection with the transportation of property for Santa Clara Sand and Gravel Co., Inc. or of said shipper's customers or suppliers, is prohibited from paying such other carriers less than the applicable minimum rates established by the Commission.

5. On or before the twentieth day following the effective date of this order, respondent MacDonald & Dorsa Transportation Company shall pay a fine of two thousand five hundred dollars ($2,500) to this Commission.

6. The motion to dismiss made by MacDonald & Dorsa Transportation Company is denied.

The Secretary of the Commission is directed to cause personal service of this order to be made upon each of the respondents, namely, MacDonald & Dorsa Transportation Company, L. J. Ciraulo, Jim Cole, David Beebe, Buryl Barton, and John Recotta. The effective date of this order as to each respondent shall be twenty days after the completion of service upon such respondent.

Dated at Los Angeles, California, this 18th day of May, 1965.

Frederick B. Holoboff
President

Peter E. Mitchell

George G. Grover

Vaughn

Commissioners

Commissioner William M. Bennett, being necessarily absent, did not participate in the disposition of this proceeding.