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ORIGINAL

Decision No. 72797

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own motion into the operations, rates and practices of ROBERT A. JONES, doing business as PARAMOUNT BUILDING MATERIALS.	Case No. 8594

Robert A. Jones, in propria persona.
Robert Pratte, for Antelope Valley Aggregates, Inc., interested party.
David R. Larrouy, Counsel, and Edward Hjelt, for the Commission staff.

O P I N I O N

By its order dated February 21, 1967, the Commission instituted an investigation into the operations, rates and practices of Robert A. Jones, doing business as Paramount Building Materials.

A public hearing was held before Examiner Gravelle on June 1, 1967, at Los Angeles.

Respondent presently conducts operations pursuant to Radial Highway Common Carrier Permit No. 19-51378. Respondent has two terminals in Lancaster, California, owns and operates three tractors, one set of bottom dumps and eight trailer dumps, and employs three drivers and one person in his office. His total gross revenue for the year ending March 31, 1967 was $207,728. Copies of the appropriate tariff and distance table were served upon respondent.

On May 16, 1966 through May 20, 1966, a representative of the Commission's Field Section visited respondent's place of business and checked his records for the period November 1, 1965 through May 1, 1966, inclusive. During said period respondent transported some 900 shipments exclusive of some few shipments for which records

were not, at the time of investigation, readily available. The underlying documents relating to some 826 shipments were removed from respondent's files and photocopied. Certain of those photocopied documents were received in evidence as Exhibits Nos. 2 and 3. Exhibits Nos. 1 and 4 are summaries prepared by the staff representative of the information contained in the balance of the photocopied shipping documents.

At the commencement of the hearing counsel for the staff requested that the reference to Public Utilities Code Sections 4044 and 4077 on the first and second pages of the Order Instituting Investigation be deleted, and stated that references in said Order to Excavation Construction Company, dba Pavich Construction Co., should have read Pavich Construction, dba Excavation Construction Company. There was no objection to these requested changes and they will hereafter be considered as though physically incorporated in the Order Instituting Investigation.

All parties stipulated that the stock ownership of non-respondent entities involved in this proceeding was a material issue in the proceeding.

Mr. A. C. Warnack testified that he and a Mr. Kenneth McDonald equally owned all the stock of both Excavation Construction Company and Antelope Valley Aggregates, Inc., and that Antelope Valley Aggregates, Inc. (AVA), used respondent for the transportation of its property during the period of review herein.

Minimum Rate Tariff No. 7 provides that subhaulers employed by a prime carrier for the movement of property pursuant to said tariff shall receive no less than 95 percent of the minimum rate and charge as compensation. In this case when respondent transported goods for AVA and employed subhaulers he deducted from the gross transportation charge the 5 percent "subhaul fee". We

are not here concerned with the subhaul deduction. Additionally respondent deducted a 5 percent factoring[1/] charge from the gross transportation charge inasmuch as during the period January 1, 1966 through the fall of 1966 all his transportation was factored through Excavation Construction Company (ECC).

Respondent testified that he had during 1960 engaged in the factoring of his bills with a third party not connected with this proceeding. Toward the end of 1965 respondent was in need of a ready cash flow due to his purchases of equipment and therefore sought out the person with whom he had done business in 1960. Said party who is located in Los Angeles told him that the distance between Lancaster and Los Angeles made the provision of a factoring service at that time impractical. Respondent then approached a Mr. Grogan, the general manager of AVA, to seek his permission and advice with regard to factoring the AVA account. Mr. Grogan referred him to Mr. Warnack who, after several discussions, referred him to a Mr. Pollack, the administrator of ECC. Thereafter Mr. Pollack agreed to provide the factoring service to respondent and they signed an agreement to that effect and instituted the practice here under consideration. Respondent at no time, until the visit by the staff representative, was aware of the fact that ECC and AVA were commonly owned by Mr. Warnack and Mr. McDonald. He ceased the factoring arrangement in the fall of 1966 because his immediate cash requirement had ceased to be severe.

Mr. Warnack testified that after his meetings with respondent, and before referring respondent to Mr. Pollack, he had

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1/ Factoring as used herein means the practice of turning over to a third party, the factor, for collection accounts receivable. It encompasses immediate cash payment by the factor to the owner of the accounts on a discounted basis, in this case five percent.

checked with his attorney regarding the legality of providing factoring for respondent. Counsel had advised him that factoring could legally be provided by a party not connected with a shipper. Since ECC and AVA were completely separate operations under separate management, Mr. Warnack concluded that it would be a legitimate undertaking on the part of ECC and so advised Mr. Pollack. Payment between AVA and ECC was made on the full amount of respondent's charges; hence, AVA reaped no direct advantage from the arrangement.

The primary issue to be decided here is whether or not the relationship between the shipper and the factor, in this case common ownership, is sufficient to cause the practice of factoring to be unlawful. Since the ultimate beneficiary of the 5 percent factoring charge is the owner of the factor and since the owner of the factor is also the owner of the shipper we find that the arrangement does provide the means for an unlawful advantage to be gained by said owners. As we have said before we must not only preclude patently unlawful devices to evade minimum rate regulation but must also prevent innocently entered into arrangements that may lead to the same unlawful result. Here there is no evidence that any unlawful end was desired either by the shipper or respondent and in fact the candor of the witnesses as well as the circumstances and documentation surrounding the procedure employed indicate that none of the parties were seeking to evade minimum rate regulation. Nevertheless the result is improper.

Staff counsel recommended that the Commission require respondent to collect from AVA the full amount of the 5 percent factoring charge, pay the subhaulers the 5 percent factoring charge deducted from them and pay a fine pursuant to Public Utilities Code Section 3800 in the amount of the factoring on movements actually transported by respondent. Exhibit No. 4 shows the factoring on

movements transported by respondent to be $1,520.26 while the amount due subhaulers which was factored is $1,770.52. In addition staff counsel recommended a punitive fine of $500 and an order to cease and desist.

The facts of this case are somewhat different from those of other matters we have heretofore considered where separate corporate entities have been involved and we have disregarded them to protect the integrity of our minimum rate structure. Here there is no showing of common management and control although we might or could infer that common ownership would at least lead to common control. We are then extending the doctrine of looking behind a corporate entity one step beyond what we have done before. For that reason, coupled with the fact that none of the parties, shipper, factor or respondent, could have accurately foreseen this extension, and because respondent was unaware of the common ownership of ECC and AVA we will not impose a punitive fine.

After consideration the Commission finds that:

1. Respondent operates pursuant to Radial Highway Common Carrier Permit No. 19-51378.

2. Respondent was served with the appropriate tariff and distance table.

3. There exists a common ownership of Antelope Valley Aggregates, Inc., and Excavation Construction Company.

4. Respondent provided transportation service for Antelope Valley Aggregate, Inc., the charges for which were factored by Excavation Construction Company for a 5 percent fee amounting in total to $3,290.78.

5. Respondent deducted from payments made to subhaulers who transported the goods of Antelope Valley Aggregates, Inc., the 5 percent factoring charge levied by Excavation Construction Company in the total sum of $1,770.52.

6. The 5 percent factor charge paid to Excavation Construction Company for transportation of the property of Antelope Valley Aggregates, Inc., constituted a rebate.

Based upon the foregoing findings of fact, the Commission concludes that respondent violated Sections 3667 and 3737 of the Public Utilities Code and should pay a fine pursuant to Section 3800 of the Public Utilities Code in the amount of $1,520.26, and in addition thereto respondent should be ordered to collect from Antelope Valley Aggregates, Inc., or Excavation Construction Company the sum of $3,290.78 which represents the factoring charge paid by respondent on the transportation of the property of Antelope Valley Aggregates, Inc.; further that respondent should be ordered to pay to the subhaulers employed by him to haul the property of Antelope Valley Aggregates, Inc., and for which a 5 percent factor charge was deducted, the total sum of $1,770.52. Respondent should further be ordered to cease and desist from any further violation of the Public Utilities Code.

The Commission expects that respondent will proceed promptly, diligently and in good faith to pursue all reasonable measures to collect the factoring charges and make payment to the subhaulers. The staff of the Commission will make a subsequent field investigation thereof. If there is reason to believe that respondent, or his attorney, has not been diligent, or has not taken all reasonable measures to collect all the factoring charges and make payment to the subhaulers, or has not acted in good faith, the Commission will reopen this proceeding for the purpose of formally inquiring into the circumstances and for the purpose of determining whether further sanctions should be imposed.

O R D E R

IT IS ORDERED that:

1. Respondent shall pay a fine of $1,520.26 to this Commission on or before the twentieth day after the effective date of this order.

2. Respondent shall take such action, including legal action, as may be necessary to collect the amounts of factoring charges set forth herein and shall notify the Commission in writing upon the consummation of such collections.

3. Respondent shall pay the following sums to the listed sub-haulers, said sums representing a portion of the total factoring charge of $3,290.78 to be collected from Antelope Valley Aggregates, Inc., or Excavation Construction Company.

Owen Todd	$ 405.39
Hugh Butler	387.14
Wiley Hamlin	325.86
Charles Johnson	291.60
Art Novak	173.16
Clyde Johnson	128.03
Mason & Co.	59.34
	$1,770.52

4. In the event factoring charges ordered to be collected by paragraph 2 of this order, or paid by paragraph 3 of this order, or any part of such factoring charges remain uncollected or unpaid sixty days after the effective date of this order, respondent shall proceed promptly, diligently and in good faith to pursue all reasonable measures to collect them; respondent shall file with the Commission, on the first Monday of each month after the end of said sixty days, a report of the factoring charges remaining to be collected or paid and specifying the action taken to collect or pay such factoring charges, and the result of such action, until such factoring charges have been collected in full and paid in full or until further order of the Commission.

5. Respondent shall cease and desist from any further violation of the Public Utilities Code either by the means outlined herein or otherwise.

The Secretary of the Commission is directed to cause personal service of this order to be made upon respondent. The effective date of this order shall be twenty days after the completion of such service.

Dated at San Francisco, California, this 25th day of JULY, 1967.

President

Commissioners

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