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ORIGINAL

Decision No. 73791

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 and E. H. Griffiths, for MacDonald & Dorsa Transportation Co., respondent.
Chester F. Berggren, for himself, interested party.
Robert C. Marks and Elinore C. Morgan, Counsel, and George Kataoka, for Commission staff.

OPINION ON REHEARING

This is an investigation on the Commission's own motion into the operations, rates and practices of respondents. We rendered Decision No. 69084 on May 18, 1965. That decision pointed out that there were three issues which the staff undertook to prove. They were:

(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.

(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).

(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 Commission held that the staff had made out its case on each and all of these issues and fined respondent MacDonald & Dorsa Transportation Company (MacDonald & Dorsa) $2,500. Said respondent petitioned for rehearing on June 4, 1965. A rehearing was granted September 14, 1965.

The petition for rehearing alleged that Decision No. 69084 was defective in that certain findings were not supported by the evidence:

1. The finding that respondent has no employees.

2. The finding that subhaulers paid trailer rentals of $8,000 per year.

3. The finding that MacDonald & Dorsa Transportation Company is the alter ego of Santa Clara Sand and Gravel Company.

4. The finding that subhaulers when used to transport property of Santa Clara Sand and Gravel are in reality prime carriers.

5. The finding that blanket authorizations by subhaulers for trailer rental deductions do not comply with Note 2 of Item 94-C of Minimum Rate Tariff No. 7.

6. The finding that trailer rentals deducted by MacDonald & Dorsa were excessive and unreasonable and constituted a device for evasion of the rates and charges prescribed by MRT 7.

Respondent MacDonald & Dorsa also contended that ordering paragraphs 1 and 4 of the decision violate the due process clauses of the Federal and State constitutions; that ordering paragraph 3 is vague and indefinite because there is no finding of what is a reasonable rental; that the penalty of a $2,500 fine is harsh and unreasonable and against the staff's recommendation.

A further contention that they were assessed a penalty without being allowed to present evidence was cured by the rehearing itself.

A rehearing was held before Examiner Power on January 10, 1967 and respondent MacDonald & Dorsa presented its office manager as a witness. Through her, five exhibits were offered. All of these exhibits were directed to the issue as to whether the trailer rentals[1/] were so unreasonable as to constitute a device for providing transportation at less than the established minimum rates. The oral testimony had the same purpose.

At the final hearing on September 14, 1967, the staff objected to these exhibits on the ground that underlying documents had not been produced. There was a dispute as to what had, and what had not, been produced. The Commission will resolve the doubts in favor of respondent MacDonald & Dorsa and will admit the exhibits.

This brings us to the question of the weight to be accorded to these exhibits. They cover a six-month period - January 1 to June 30, 1962. An examination of the gross revenues of MacDonald & Dorsa reveals the following:

First 6 Months		Second 6 Months	
1st Quar.	$193,331.63(1)	3rd Quar.	$543,228.32(1)
2nd Quar.	303,152.79(1)	4th Quar.	453,771.34(1)
Total	$496,484.42	Total	$996,999.66

(1) Figures from Exhibit No. 12, Quarterly Reports.

The company obtained two-thirds of its gross revenue in the last six months of 1962. MacDonald & Dorsa's exhibits, however, are based on the first six months of that year when only one-third of the revenue was produced. There are certain expenses that go on whether equipment is used or not. One of these is known, from the oral evidence, to have existed here. Sand and Gravel charged

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1/ They show that MacDonald & Dorsa sublet bottom dump trailers for a rental equal to 33-1/3% of the gross revenue derived from the use of such trailers. The Commission's cement tariff (MRT-10, Item 165) fixes a reasonable trailer rental at 9% of such gross revenue. A similar determination for Sand and Gravel might be higher but certainly not 24% more.

respondent MacDonald & Dorsa $30,000 per year for clerical and management service. This was assessed at the rate of $2,500 per month and we find $15,000 charged for the half year.

The business of MacDonald & Dorsa was subject to very wide fluctuations. For example, the poorest month in 1962 - February - produced $19,851 in gross revenue. The busiest month - November - produced $207,464, more than ten times as much. Odd cents have been omitted in both cases. Where such a situation exists, it is obvious that the longer period of time a sample covers the more accurate it will be. Since the staff exhibits trace the history of five sets of equipment for a full year, while respondent MacDonald & Dorsa's exhibits cover ten sets for a half year, the staff's exhibits are far more persuasive.

In the Commission's opinion, respondent MacDonald & Dorsa's evidence is not sufficient to meet the staff showing. Decision No. 69084 should be affirmed.

The following order will reaffirm the findings, conclusions and order of Decision No. 69084 except that amendments to findings Nos. 3, 4, 5 and 7 will be made.

ORDER ON REHEARING

IT IS ORDERED that:

1. Exhibits Nos. 17, 18, 19, 20, 21 and 22 are admitted in evidence.

2. Finding No. 3 of Decision No. 69084, dated May 18, 1965, in this proceeding is amended to read as follows:

> "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. After the beginning of the year 1962, MacDonald & Dorsa had no employees other than two trailer cleaners employed for one month each, and neither owns nor operates any equipment."

3. Finding No. 4 of said decision is amended to read as follows:

"4. MacDonald & Dorsa leases sixty-five pairs of 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 set of trailers was approximately $12,000, and each has a service life of approximately eight years. Under subleases of the type in evidence here, the rent of such a pair could rise to approximately $8,000 a year if the equipment were employed for substantially the full year. In 1962 the rentals of the pairs of trailers leased to the subhauler respondents did in fact amount to approximately $8,000 each."

4. Finding No. 5 of Decision No. 69084, dated May 18, 1965, in this proceeding is amended to read as follows:

"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 were so far in excess of any reasonable charge for the detention and use of the equipment that they 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 No. 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."

5. Finding No. 7 of said decision is amended to read as follows:

"7. The alleged trailer rentals deducted by respondent MacDonald & Dorsa from payments otherwise due in 1962 to the other respondents as subhaulers were so far in excess of any amount that could be described as a reasonable charge for the detention and use of the equipment that they 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 No. 16 (except Parts 2 and 11 thereof)."

6. As herein amended, Decision No. 69084 is affirmed.

The effective date of this order and of Decision No. 69084, as amended herein, shall be twenty days after the date hereof.

Dated at San Francisco, California, this 5th day of MARCH, 1968.

President

Commissioners

Commissioner Peter E. Mitchell, being necessarily absent, did not participate in the disposition of this proceeding.