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ORIGINAL

Decision No. 76621

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own motion into the operations, rates, and practices of FEDERAL CEMENT TRANSPORTATION, INC., a California corporation; M. E. DAVIS TRUCKING CO., a California corporation; WARREN S. HARROD, and GARY E. GRAYSON.	Case No. 8893 (Filed February 4, 1969)

Donald Murchison, for Federal Cement Transportation, Inc., M. E. Davis Trucking Co., Warren S. Harrod and Gary E. Grayson, respondents.
Gary L. Hall, Counsel, and E. E. Cahoon, for the Commission staff.

O P I N I O N

On February 4, 1969 the Commission instituted an investigation on its own motion against Federal Cement Transportation, Inc. (Federal), M. E. Davis Trucking Co. (Davis), Warren S. Harrod (Harrod), and Gary E. Grayson (Grayson). Federal was charged with violating the Public Utilities Code by paying to carriers utilized by it (Harrod, Grayson, and Davis) amounts different than the applicable rates and charges prescribed by law. Harrod, Grayson, and Davis were charged with violating the Public Utilities Code by charging and collecting from Federal rates and charges different than the rates and charges prescribed by law. All respondents were charged with violating the Public Utilities Code by the use of a lease device or arrangement which

permitted a person or corporation to obtain the transportation of property over the public highways of this State at rates and charges less than, or different from the applicable rates and charges prescribed by law. Additional charges were whether Federal had violated General Order No. 102-C and Section 1074 of the Public Utilities Code by failing to have the required subhaul or equipment lease bond; and whether Harrod and Grayson had violated Sections 1063 and 3621 of the Public Utilities Code by operating as a cement carrier or as a cement contract carrier without having first obtained from the Commission a certificate or permit authorizing such operation. Public hearings were held before Examiner Robert Barnett at Los Angeles on May 7, 8, and 9, 1969. On the latter date the matter was submitted subject to the filing of briefs, which have been received.

Staff Evidence

The staff presented evidence which showed that in January 1968 Federal entered into separate agreements[1/] with

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1/ In our opinion these agreements, called "Lease Agreements", were in fact options to lease. No lease was created until Federal exercised its option. This point will be discussed in more detail below. However, in keeping with the nomenclature used by all parties we will refer to the parties to to the agreement as "lessor" and "lessee" rather than "optionor" and "optionee".

each of the other respondents whereby Federal obtained an option to lease power equipment from each other respondent for the purposes of transporting cement. The pertinent provisions of the agreement are as follows:

> "(2) It is understood and agreed that the equipment described under this Lease Agreement is in the exclusive possession, control, and/or the actual use of the LESSEE during the terms of this lease.
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> (4) The LESSOR agrees to furnish all necessary oil, fuel, tires and repairs for the operation of said equipment and to pay all other expenses incident to the operation thereof.
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> (7) That the compensation to be paid by the LESSEE to the LESSOR for the lease of the vehicles described herein shall be the amount to be mutually agreed upon for each specific haul or job to which each vehicle is, or will be assigned. Said agreement as to price to be in writing, signed by the parties hereto, and incorporated into this Lease Agreement as a part thereof.
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> (8) It is further agreed that from any and all compensation due LESSOR, the LESSEE SHALL DEDUCT THEREFROM the following operating expense items: Drivers wages, including all benefits required by Union Agreement; Insurance paid by LESSEE; all taxes, including Social Security, Workman's Compensation, Withholding Tax; and any Commission or Rental Fee due Lessee. It is further agreed that all charges incurred by the LESSOR, other than those indicated above, for which LESSEE is or maybe, obligated to pay shall be subject to a bookkeeping expense of 2% of each charge over $10.00 and 5% of each charge under $10.00.
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> (11) This agreement shall remain in full force and effect for a period of six months from the date of execution hereof and shall be automatically renewed for successive periods of six months thereafter unless cancelled by either party by the giving of ten (10) days notice, in writing, of intention to do so."

The compensation to be paid by lessee to lessor was 28¢ a mile.

Other staff evidence may be summarized as follows: The transportation involved in this proceeding took place during January, February, and March of 1968. Federal is a common carrier of cement. Federal itself does not own any tractors that are used in transporting cement but does own seven sets of trailers. After entering into a contract with Consolidated Rock Products Co., which provided for Federal to transport cement for Consolidated, Federal entered into agreements (whose principal terms are set forth above) with the other three respondents through which Federal obtained power equipment to perform the actual hauling. Federal then placed Gary Grayson on its payroll to drive a tractor. Federal placed Gary Davis, the vice president of M. E. Davis Trucking Co. and the son of the owner of M. E. Davis Trucking Co., on its payroll to drive one of the tractors. Federal hired three other drivers to drive the remaining tractors. Federal paid all applicable state and federal taxes pertaining to its employees, withheld income taxes, and did other acts required of an employer by law in relation to its employees.

Approximately every two weeks Federal would settle with the lessors. The settlements were not based upon actual miles driven but were based upon mileage between point of origin and point of destination of the particular shipments hauled. This mileage was paid for on the basis of 28¢ a mile. After the gross amount due lessor was determined Federal then deducted from that amount the driver's wages for the hauls involved, board of equalization taxes, Public Utilities Commission taxes, workmen's

compensation payments, unemployment insurance, F.I.C.A. payments, and charges for fuel and maintenance, if any. The net amount was then paid to the lessor.

Pursuant to the agreement Federal had first call on the tractors listed in the agreement. When Federal did not require the use of those tractors the lessors could use the tractors in their own businesses. During the period involved Federal participated in approximately 320 cement hauls. Of those 320 hauls approximately 20 were performed by drivers not listed on Federal's payroll.

A staff rate expert testified that if the cement movements were treated as subhauls the tariffs applicable to those moves required the prime carrier (Federal) to pay to the subhaulers (Grayson, Davis, and Harrod) 100 percent of the prescribed charges. The difference between 100 percent of the applicable charges (less deductions authorized by the tariffs) and the amounts actually paid to Grayson, Davis, and Harrod are: Grayson - $615.90; Davis - $953.40; and Harrod - $1,836.79.

At the time of the transportation of cement involved in this proceeding Federal had not obtained a subhaul or equipment lease bond as required by General Order No. 102-C and Section 1074; nor did Grayson and Harrod have authority to transport cement.

Respondents Evidence

a. Federal

Federal introduced evidence which showed that it employed five drivers including Gary Davis and Gary Grayson. These drivers were hired on a day to day basis depending upon the amount of work available. None of the drivers drove the same truck every day although Grayson usually drove the truck that he leased to Federal and Gary Davis usually drove the truck that M. E. Davis leased to Federal. The cement hauling involved in this case usually occurred at night and the tractors were available for other types of hauls during the day. On the few occasions when drivers who were not employees of Federal drove the tractors on a Federal cement haul it was because of "driver swaps." A driver swap would occur when one of the regular employees, for one reason or another (illness or other personal reasons) could not drive the tractor. On those occasions the regular driver would obtain the services of another driver to make the run. Federal would pay the regular driver for the run and make the usual deductions from the regular driver's pay for taxes and other items. The regular driver would then pay the substitute driver pursuant to whatever agreement they may have had, with which Federal did not concern itself.

b. Harrod

Mr. Harrod testified that he has been leasing tractors since 1960. He has nothing to do with trailers. He leased eight tractors to Federal, but Federal only used three of those tractors. The other five were on the lease as reserves for Federal in case one of the tractors Federal was using broke down. He said that on some occasions there are driver swaps when the regular driver cannot make a run. In those instances the regular driver is paid by the carrier and in turn the regular driver pays his substitute. None of the five drivers employed by Federal were ever on his payroll. He had no control over which drivers would drive the leased tractors and Federal could assign any driver to any tractor. He testified that the 28¢ a mile rate less deductions was fair, and was based on his business experience. In his own business of hauling aggregates he hired drivers on a day to day basis. He never told a driver to haul for Federal.

c. Davis

Gary Davis testified that he is vice president of M. E. Davis Trucking Co., which company is owned by his father. Gary Davis entered into a lease on behalf of M. E. Davis Trucking Co. to lease a tractor to Federal. He then became an employee of Federal and was paid by Federal on an hourly basis when he drove. He usually drove his own tractor, which he would take home in the evening. He charged Federal 28¢ a mile less deductions for the lease of the tractor. He computed his mileage by using

speedometer miles less the mileage between his home and point of origin and less any mileage driven in order to make repairs. He almost always drove his own tractor. During this same period he also drove for M. E. Davis Trucking Co. and subhauled aggregates.

d. Grayson

Mr. Grayson's testimony was similar to Mr. Davis' as to payment and employment by Federal. He also drove his own tractor on almost all occasions. He did not have any outside business during the period under investigation.

Discussion

The basic issue in this case is whether Federal has violated Item No. 163 of Minimum Rate Tariff No. 10 by paying to carriers utilized by it an amount less than 100 percent of the charges applicable under minimum rates. The pertinent provision of Item No. 163 states:

> "Charges paid by any overlying carrier to an underlying carrier and collected by the latter from the former for services of said underlying carrier shall be 100 percent of the charges applicable under minimum rates prescribed in this tariff, less the gross revenue taxes applicable and required to be paid by the overlying carrier."

The terms "underlying carrier" and "subhauler" are interchangeable, and in this opinion we will use the term "subhauler."

It is apparent from reading Item No. 163 that if no subhauler is involved in a particular transportation movement there can be no violation of Item No. 163. The Commission has defined a subhauler as one who "supplies both the equipment and

the drivers." (Re Payments made to Underlying Carriers (1949) 48 CPUC 576, 582.) If a lessor of power equipment to a carrier does not also provide a driver such lessor cannot be a subhauler. And, therefore, the terms of the lease of power equipment become irrelevant when determining if a violation of Item No. 163 has occurred.

When the lessor of power equipment also provides a driver (usually himself) the question of whether the lessor is a subhauler or merely an employee of the lessee depends, in large part, on the terms of the lease. The terms of the lease must provide that the lessee has the complete control and responsibility for the operation of the motor vehicle. (Re Webster H. Tennis (1964) 63 CPUC 665.) Part of such complete control and responsibility is that certain characteristic burdens of the transportation business, such as repair and maintenance, are to be born by the person providing the transportation service, and not shifted to the owner-operator. (United States v. Drum (1962) 368 US 370, 379, 7 L ed 2d 360, 367.) The criteria set forth in Drum and Tennis, as applied to the agreements in this case, show that these agreements do not place the motor vehicle under the complete control and responsibility of the lessee. Paragraph 4 of each agreement provides that "the lessor agrees to furnish all necessary oil, fuel, tires and repairs for the operation of said equipment and to pay all other expenses incident to the operation thereof." Such a provision in a lease of a motor vehicle shifts certain characteristic burdens of the transportation business from the

lessee to the lessor and thereby removes from the lessee the complete control and responsibility for the motor vehicle.

Applying the above principles to the facts of this case it is apparent to us that respondent Grayson is a subhauler. He provided power equipment, he drove the power equipment, and the agreement that he entered into with Federal did not provide for Federal to assume the complete control and responsibility for the motor vehicle.

The evidence shows that M. E. Davis Trucking Co. acted in the capacity of a subhauler for Federal. Gary Davis is the vice president of M. E. Davis Trucking Co., which company is owned by Gary Davis's father. Gary Davis executed the agreement in question and drove the leased vehicle for Federal. Between trips for Federal Gary Davis would drive the same power equipment on jobs for M. E. Davis Trucking Co. On these facts, we find that M. E. Davis Trucking Co. provided the power equipment and the driver for Federal. Because the agreement between M. E. Davis Trucking Co. and Federal did not provide for the complete control and responsibility of the leased vehicle to be in Federal the agreement was ineffective to negate a prime carrier-subhauler arrangement.

The evidence shows that Harrod was not a subhauler for Federal. Although Harrod provided the power equipment for numerous transportation movements of Federal, Harrod did not provide the driver.[2/]

The staff asserts that Harrod should be deemed to have provided the drivers because the drivers' wages, plus F.I.C.A., workmen's compensation insurance, and state unemployment insurance, were deducted from the gross amounts due Harrod under the agreement. Thus, the staff argues, "It is evident that Federal did not really incur the burdens incident to being an employer. It is Harrod who, in effect, is being cast in the light of a constructive employer (emphasis added) because he is actually 'footing the bill' of these employees, while Federal is relegated to being a conduit for bookkeeping entries." The staff argument is not persuasive. It overlooks the very obvious burdens of direction and control of the employees, the responsibility for the employee's work, and possible liability for the employee's errors. Its weakness is apparent when considered in the light of evidence that no driver of any respondent was guaranteed a minimum salary or a minimum period of employment. If there was no work to be performed, the drivers were not paid, and they were free to find work elsewhere. It appears to us that if drivers are free to find work elsewhere when they do find such work they are employees

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2/ The few times that persons who drove for Harrod also drove for Federal occurred when the regular Federal driver was unavailable. The regular driver provided the substitute; the regular driver was paid the wage; and the regular driver recompensed the substitute. There is no evidence that Harrod did any acts in connection with this substitution.

of the person who puts them to work, not of a former employer, or of a stranger.[3/] Federal, not Harrod, was liable for the drivers' wages, withholding, F.I.C.A., workmen's compensation insurance, torts commited within the scope of employment, and other charges. Realistically, the staff argument treats the drivers as employees of Federal for all purposes except when the driver drives a vehicle leased from Harrod, at which time Harrod is deemed to be the constructive employer of the driver for the sole purpose of transforming Harrod into a subhauler. Such a result is totally fictitious, is not warranted by the facts, and creates a new relationship in law, the constructive employer, with no delineation of such employer's rights and liabilities, nor those of the constructive employee or the nominal employer. The test is not necessarily who is the employer, but who provides the driver.

The staff argues that if we find that Harrod is not a subhauler because both the equipment and driver were not provided from the same source, "it would only be necessary for the 'lessor' and 'lessee' to conceive a fictitious third party to supply the drivers in order to evade the Commission's regulatory jurisdiction over subhauling." This argument is without merit. First, it is a Commission requirement that before a subhauling relationship is found to exist both the equipment and the driver must be provided from the same source (Re Payments Made to Underlying Carriers (1949) 48 CPUC 576, 582); second, if a fictitious third party is created to supply the

3/ We can envision a situation where carrier A leases equipment under terms similar to those in the case at bar to carrier B and drivers who were regularly employed by carrier A suddenly appear on carrier B's payroll for the period of the lease. Under such facts an inference can be drawn that carrier A is providing the drivers. But such is not the case herein.

drivers there is no legal problem (although perhaps an evidentiary one) in negating this fiction. Looking through chimera to find reality is a common function of lawsuits; we have done so in the case of M. E. Davis Trucking Co. If there is a serious problem in the use of leases with terms of the kind involved herein a solution might be to ban such terms. But it is no solution to create a fictional employer-employee relationship and then declare the lessor to be a subhauler.

However, to say that the agreements between Federal and the other respondents did not, of themselves, create the relationship of prime-carrier-subhauler does not mean that the agreements were not in violation of law. Item No. 165 of MRT No. 10 states: "4. No carrier shall lease any power equipment ... for a period of less than thirty (30)days." All respondents are carriers, the equipment leased was power equipment, and the term was for less than 30 days - in fact, the leases were trip leases.

The name given to an agreement by the parties thereto is not controlling. It is the actual effect of the terms that determines the nature of the agreement. A lease usually implies an instrument by which the exclusive possession of property is given for a limited period against all the world, including the owner. (Kaiser Co. v. Reid (1947) 30 C 2d 610, 619.) An option is an offer by which a promisor binds himself in advance to make a contract if the optionee accepts upon the terms and within the time designated in the option. The optionor is bound while the optionee is free to accept or not as he chooses. (Hayward Lbr. & Inv. Co. v. Construction Products Corp. (1953) 117 CA 2d 221, 229.)

The agreements in the case at bar do not bind Federal to do anything, or pay anything, until Federal elects to use equipment of the optionor. But the optionor is bound to provide the equipment on demand for a period of six months. This is an option. It is only when Federal uses the equipment that the terms of the agreement become effective, and only for the specific haul or job to which each vehicle is assigned. This is a lease - and its term is measured by the specific haul or job, none of which required 30 days to complete.

One characteristic of cement transportation is that drivers are usually hired on a day-to-day basis. If there is no work, the driver does not get paid. Item No. 165 of MRT No. 10 requires leases to be for at least a 30-day duration. The legal and economic effects of these facts as applied to leasing power equipment is obvious. If the 30-day provision is obeyed, agreements with terms of payment as set forth in the agreements under consideration herein would be illegal if the lessor could use the vehicle when the lessee did not use it, and would be uneconomical, from the lessor's viewpoint, if the lessor could not use the vehicle when the lessee did not use it. Enforcement of the 30-day provision should effectively prevent the creation of agreements of the kind under consideration.

Findings of Fact

1. Respondent Federal has a cement certificate and a highway contract permit; respondent Davis has a cement certificate and a radial highway common carrier permit; respondent Harrod has a radial highway common carrier permit; respondent Grayson has no operative authority from this Commission.

2. The commodity involved in this proceeding was cement in bulk and in sacks.

3. Federal was served with MRT No. 10 and is a party to Western Motor Tariff Bureau's Tariff No. 17.

4. Federal leased equipment without having a bond on file as required by General Order No. 102-C.

5. Federal does not own any tractors that are used in transporting cement but does own seven sets of trailers. Federal entered into agreements with the other three respondents through which Federal obtained power equipment to perform cement hauling utilizing Federal's trailers. Federal placed Gary Grayson on its payroll to drive a tractor. Federal placed Gary Davis, the vice president of M. E. Davis Trucking Co. and the son of the owner of M. E. Davis Trucking Co. on its payroll to drive one of the tractors. Federal hired three other drivers to drive the remaining tractors. Federal paid all applicable state and federal taxes pertaining to its employees, withheld income taxes, and did other acts required of an employer by law in relation to its employees.

6. The agreements entered into by Federal with the other respondents provided that the owners of power equipment would lease power equipment to Federal for compensation computed on the basis of 28¢ a mile for each mile the tractor was driven. From that 28¢ a mile, the lessor agreed to furnish all necessary oil, fuel, tires, and repairs for the operation of the equipment and to pay all expenses incident to the operation thereof. It was further agreed that from any and all compensation due lessor, the lessee shall deduct therefrom the following operating expense items: drivers' wages, including all benefits required by union agreement; insurance paid by lessee; all taxes, including social security, workmen's compensation, withholding tax; and any commission or rental fee due lessee. It was orally agreed between the parties to the written agreements that when Federal did not require the use of the tractors listed in the written agreement the owner of the tractor could use the tractor in his own business. These agreements did not bind Federal to do anything, or pay anything, until Federal elected to use the equipment of the lessor. The agreements did bind the lessor to provide the equipment on demand for a period of six months.

7. The agreements in the case at bar were options of a duration of six months. It was only when Federal exercised its option to utilize a tractor that a lease agreement was created. No lease agreement, under the option exercised by Federal, lasted for 30 days or more. All lease agreements entered into by Federal were trip leases.

8. The lease of tractors, when Federal exercised its option, did not provide for Federal to assume the complete control and responsibility for the motor vehicle.

9. Grayson supplied to Federal power equipment and a driver.

10. M. E. Davis Trucking Co. supplied to Federal power equipment and a driver.

11. Both Grayson and M. E. Davis Trucking Co. were sub-haulers or underlying carriers within the meaning of Item No. 163 of MRT No. 10.

12. Grayson has charged less than the lawfully prescribed minimum rate in the instances set forth in Exhibit No. 16 amounting to $615.90. Respondent M. E. Davis Trucking Co. has charged less than the lawfully prescribed minimum rates in the instances set forth in Exhibit No. 16 amounting to $953.40.

13. Federal has by the use of a lease device or arrangement obtained the transportation of property over the public highways of this state at rates and charges less than the applicable rates and charges prescribed in Western Motor Tariff Bureau's Tariff No. 17.

14. Grayson has operated as a cement carrier without having first obtained from the Commission a certificate or permit authorizing such operation.

15. Grayson and Davis have, by the use of a lease arrangement, assisted and permitted Federal to obtain the transportation of property over the public highways of this state at rates and charges less than the applicable rates and charges prescribed in MRT No. 10 and Western Motor Tariff Bureau's Tariff No. 17.

16. Grayson and Davis have charged and collected from Federal rates and charges different than the rates and charges prescribed in MRT No. 10 and Western Motor Tariff Bureau's Tariff No. 17.

17. All respondents have violated Item No. 165 of MRT No. 10 by leasing power equipment for a period of less than 30 days.

Conclusions of Law

Based on the foregoing findings of fact, the Commission concludes that:

1. Federal violated Sections 453, 458, and 1074 of the Public Utilities Code, and General Order No. 102-C and Items Nos. 163 and 165 of MRT No. 10.

2. Davis has violated Sections 458 and 494 of the Public Utilities Code and Items Nos. 163 and 165 of MRT No. 10.

3. Grayson has violated Sections 1063, 3621, 458, 494, 3664, and 3667 of the Public Utilities Code, and Items Nos. 163 and 165 of MRT No. 10.

4. Harrod has violated Section 3737 of the Public Utilities Code and Item No. 165 of MRT No. 10.

5. Federal should pay a fine pursuant to Section 1070 of the Public Utilities Code in the amount of $3,000.

6. Davis and Grayson should be ordered to collect from Federal the difference between the rates and charges actually billed and collected and the rates and charges due under MRT No. 10 and Western Motor Tariff Bureau's Tariff No. 17, to wit: Grayson to collect $615.90, and Davis to collect $953.40.

7. Federal should be ordered to pay to Grayson the amount of $615.90 and to Davis the amount of $953.40, which amounts are the difference between the rates and charges actually billed and paid and the rates and charges due under MRT No. 10 and Western Motor Tariff Bureau's Tariff No. 17.

8. Grayson should be ordered to pay a fine in the amount of $615.90 as provided by Sections 3800 and 2100 of the Public Utilities Code. Respondent Davis should be ordered to pay a fine in the amount of $953.40 as provided by Section 2100 of the Public Utilities Code.

9. All respondents should be ordered to cease and desist operating pursuant to lease agreements which are in violation of Item No. 165 of MRT No. 10, and to refrain from operating pursuant to any other agreement or arrangement that amounts to a device to evade the prescribed tariff charges.

10. Grayson should be ordered to cease and desist from operating as a carrier of cement until such time as he is properly authorized by the Commission.

O R D E R

IT IS ORDERED that:

1. Federal Cement Transportation, Inc. pay a fine of $3,000 on or before the fortieth day after the effective date of this order.

2. M. E. Davis Trucking Co. and Gary E. Grayson shall take such action, including legal action, to collect the undercharges due them from Federal Cement Transportation, Inc., said amounts being $953.40 and $615.90 respectively, and shall notify the Commission in writing upon consummation of such collections.

3. Federal Cement Transportation, Inc. shall pay to Gary E. Grayson and M. E. Davis Trucking Co. the amounts of undercharges set forth in Ordering Paragraph No. 2.

4. Gary E. Grayson shall pay a fine of $615.90 as provided by Sections 3800 and 2100 of the Public Utilities code upon collection of said amount from Federal Cement Transportation, Inc.

5. M. E. Davis Trucking Co. shall pay a fine of $953.40 as provided by Section 2100 of the Public Utilities Code upon collection of said amount from Federal Cement Transportation, Inc.

6. Federal Cement Transportation, Inc., M. E. Davis Trucking Co., W. S. Harrod, and Gary E. Grayson shall cease and desist from operating pursuant to lease agreements which are in violation of Item No. 165 of MRT No. 10, and refrain from operating pursuant to any other agreement or arrangement which amounts to a device to evade the tariff charges.

7. Gary E. Grayson shall cease and desist from operating as a carrier of cement until such time as he is properly authorized by the Commission.

The Secretary of the Commission is directed to cause personal service of this order to be made upon each respondent.

The effective date of this order, as to each respondent, shall be twenty days after the completion of service on the respondent so served.

Dated at San Francisco, California, this 30th day of DECEMBER, 1969.

William Symons, Jr.
President

Commissioners

Commissioner A. W. Gatov, being necessarily absent, did not participate in the disposition of this proceeding.