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ORIGINAL

Decision No. 76737

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own motion into the operations, rates and practices of J & H TRANSPORTATION CO., a California corporation, EDWIN E. WALLACE, WARREN S. HARROD, GLENN V. HOLLINGSWORTH, EVERETT WILLIAM RAY, ROLAND E. VOIGHT, and LOUIS E. MANDERSCHEID, individually and doing business as L. E. MANDERSCHEID TRUCKING.	Case No. 8892 (Filed February 4, 1969)

Phil Jacobson, for J & H Transportation Co.; Donald Murchison for Warren S. Harrod, Edwin E. Wallace, Glenn V. Hollingsworth, and Everett William Ray, respondents.
George H. Roe, for California Portland Cement Company, interested party.
Gary 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 J & H Transportation Co. (J & H), Edwin E. Wallace (Wallace), Warren S. Harrod (Harrod), Glenn V. Hollingsworth (Hollingsworth), Everett William Ray (Ray), Roland E. Voight (Voight), and Louis E. Manderscheid, individually and doing business as L. E. Manderscheid Trucking (Manderscheid). J & H was charged with violating the Public Utilities Code by paying to carriers utilized by it (Wallace, Harrod, Hollingsworth, Ray, Voight, and Manderscheid) amounts different than the applicable

rates and charges prescribed by law. All respondents other than J & H were charged with violating the Public Utilities Code by charging and collecting from J & H 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 respondents Harrod, Hollingsworth, Ray, Voight, and Manderscheid 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 April 23 and July 21, 1969.

Staff Evidence

The staff called respondent Wallace who testified that he hauled cement for J & H during the period under investigation, the last quarter of 1967. He testified that he used his own power equipment and pulled J & H trailers; he was listed on J & H's books as an employee; he had no guaranteed salary and was free to work for others if there was no work from J & H; he could utilize his power equipment when working for others. He entered into an agreement with J & H which provided that he would lease his power equipment to J & H for compensation computed on the

basis of 24¢ a mile for each mile the tractor was driven. From this 24¢ a mile he 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. It was further agreed that from any and all compensation due him J & H would deduct the following operating expense items: driver's wages, including all benefits required by union agreement, insurance paid by lessee, all taxes, including social security, workmens compensation, withholding tax, and any commission or rental fee due J & H. The agreement was to remain in effect for six months.

Respondent Wallace's wife testified that she kept the accounts for her husband. She testified that her husband was not paid on a mileage basis but was paid a dollar amount determined by J & H. From this dollar amount the witness was to compute the mileage and bill J & H for that mileage. The scheme worked like this: J & H's accountant would inform Mrs. Wallace of the gross amount they would pay for the use of Mr. Wallace's tractor. From this gross amount, J & H told Mrs. Wallace to deduct 25 percent. The remaining figure was then divided by .24 and the result of that division was the amount of mileage she was to bill J & H. From the amount billed J & H, J & H would then deduct for such items as driver's wages, social security, taxes, etc. The witness further testified that J & H deducted amounts for trailer repairs and for tires for trailers. Mr. Wallace did not own any trailers. It appears from the evidence that the gross amount supplied by J & H from which Mrs. Wallace began

her computations was computed from the appropriate minimum rate tariff applicable to the haul involved, although there was some variation.

A staff witness sponsored Exhibit No. 4 which is a compilation of freight bills, invoices, recapitulation sheets, and checks. This exhibit included the freight bills of all respondents for the period under review. All charges for all respondents except respondent Wallace were computed in essentially the same manner. An explanation of one will suffice for all. An analysis of the freight bills of respondent Hollingsworth for cement transported during the period under review and pulled by Hollingsworth's tractor shows the following method of computing charges paid to Hollingsworth: On each trip that a Hollingsworth tractor was used a freight bill would be prepared with charges based upon the applicable minimum rates. (Some of these freight bills were erroneously computed because of a mistake in either origin or destination points. But it appears that these mistakes were inadvertent.) These freight bills were prepared by J & H and, presumably, were paid by the shipper. After a number of hauls, Hollingsworth would prepare a bill for J & H which bill would be based upon the number of miles driven at 26½¢ a mile rental. The mileage was computed by doubling the distance, as shown on Distance Table No. 5, between point of origin of haul and point of destination. In the case of Hollingsworth, his bill based on mileage was approximately 65 percent of the gross revenue based upon tariff charges.[1/] From this bill J & H deducted drivers' wages and taxes where appropriate.

1/ The other respondents computed their billing in the same manner. Their billing as a percentage of tariff charges was: Ray-68% Manderscheid-70%; Voight-69%; Harrod-75%. This difference between billing and tariff charge is J & H's trailer charge.

In the case of Ray and Voight no drivers' wages were deducted because Ray and Voight drove their own power equipment. The power equipment of Hollingsworth and Manderscheid was not driven by the lessors but was driven by drivers on J & H's payroll. The wages of those drivers were deducted from the gross billing presented by Hollingsworth and Manderscheid. As to Harrod, wages were deducted in those cases where the driver was listed as an employee of J & H.

A staff rate expert testified that if all respondents other than J & H were considered as subhaulers for J & H the amounts that they charged for the transportation service they performed were less than the rates due subhaulers under the appropriate tariff, MRT No. 10. The undercharges are:

Wallace	$3,668.49
Harrod	2,011.79
Hollingsworth	663.17
Ray	286.50
Manderscheid	87.43
Voight	78.75
Total Charges Due Subhaulers	$6,796.13

J & H Evidence

J & H presented two witnesses who testified only concerning the Wallace transactions. One witness testified that J & H deducted tire payments from Wallace because J & H had extended credit to Wallace to purchase the tires. The witness stated that he had no idea whether the tires went on Wallace's tractor, whether he sold them, or whether he went into the tire business. The other witness for J & H testified that if Wallace had been paid for mileage based upon Distance Table No. 5 between the points that he transported cement he would have been paid a lesser amount than the amounts he was paid based upon the mileage he submitted to J & H.

Harrod Evidence

It was stipulated that if Mr. Harrod testified in detail his testimony concerning his method of operation with J & H would be substantially the same as the method of operation testified to by him in the investigation of Federal Cement, Case No. 8893. He testified that the technic of operation, the procedures employed, and the leases entered into were the same between Harrod and J & H as they were between Harrod and Federal Cement. He said that he supplied power equipment only, no drivers. He used the same power equipment in his own aggregate hauling business when J & H didn't require the equipment. When using his own equipment he hired drivers on a day-to-day basis.

Discussion

In Investigation of Federal Cement Transportation Inc. (Case No. 8893, Decision No. 76621 dated December 30, 1969) we were confronted with a fact situation very similar to the case at bar. In Federal Cement certain persons leased their power equipment to Federal and in some cases were carried on Federal's payroll as employees. In finding some of the lessors to be subhaulers we held that a subhauler is one who supplies both the equipment and the drivers to a prime carrier. If a lessor of power equipment to a carrier does not also provide a driver such lessor cannot be a subhauler. If the lessor drives the power equipment for the prime carrier but is not shown as an employee of the prime carrier such a lessor is a subhauler for the reasons, among others, that the complete control and responsibility for the transportation is not that of the prime carrier.

Applying these standards to the case at bar it is our opinion that Ray and Voight were subhaulers, as they drove their own power equipment and were not shown as employees by J & H. By the same standards Hollingsworth and Manderscheid were not subhaulers as they did not drive the power equipment they leased to J & H nor did they provide drivers for the power equipment. In our opinion Wallace was a subhauler. Notwithstanding the fact that he was shown as an employee of J & H and did lease his power equipment to J & H the lease of the power equipment provided 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. Such being the case, the Wallace - J & H lease was not of such a nature as to remove Wallace from the category of subhauler.

The determination of the status of Harrod requires a somewhat more detailed analysis. The lease between Harrod and J & H was substantially the same as the lease between Wallace and J & H with the same defects in shifting certain characteristic burdens of transportation. However, the problem in the Harrod - J & H relationship is not the lease but whether Harrod supplied drivers for the power equipment he leased to J & H. Exhibit No. 5 shows that during the period under investigation certain drivers drove for both J & H and Harrod. Those drivers are Bellew, Burchel, Hicks, O'Dell, and Wesmorlan. Of these drivers only Hicks is shown as an employee of J & H. During the month of October 1967 they drove a total of 61 loads for Harrod. During this same month they drove Harrod's trucks for J & H a total of 27 times. (A driver named Slate, an employee of J & H, drove one load for Harrod in Harrod's transportation business. As this appears to have been an accommodation Slate will not be considered a driver of Harrod.) In our opinion this evidence is sufficient to support the inference that

Harrod supplied the aforenamed drivers and, therefore, was a subhauler of J & H for the transportation performed by those drivers. As to the transportation performed with Harrod's power equipment driven by J & H employees who apparently had no connection with Harrod we find that Harrod was not a subhauler.[2/] We have recomputed the charges on the hauls Harrod made for J & H as a subhauler and find undercharges in the amount of $637.38.

Although the staff introduced only the leases of Wallace and Harrod (Harrod's lease by stipulation of testimony) it is apparent from an analysis of the freight bills submitted in evidence that all the leases involved in this case were substantially similar to the leases involved in the Federal Cement case (Case No. 8893). In that case we found that the leases were actually option agreements of a duration of six months. It was only when the prime carrier exercised its option to utilize a tractor that a lease agreement was created. None of these lease agreements, under the option so exercised, lasted for 30 days or more as required by Item No. 163 of Minimum Rate Tariff No. 10. Just as the leases in Case No. 8893 were in violation of the tariff, so the leases in this case are also in violation.

2/ We do not mean to imply that in order to find Harrod to be a subhauler a Harrod supplied driver must drive a Harrod supplied vehicle. If Harrod supplied a driver and vehicle but the driver drove a different vehicle we might consider such an arrangement a subterfuge to evade regulation. However, there is no evidence of such practice in this case.

Findings of Fact

1. During the period under investigation respondent J & H had a cement certificate and a radial highway common carrier permit; respondent Wallace had a highway contract carrier permit and a cement contract carrier permit; respondent Harrod had a radial highway common carrier permit (respondent Harrod subsequently obtained a cement carrier certificate (Decision No. 76275 dated October 15, 1969 in Application No. 51298)); respondent Hollingsworth had a radial highway common carrier permit; respondent Ray had a radial highway common carrier permit; respondent Voight had a radial highway common carrier permit; and respondent Manderscheid had a radial highway common carrier permit.

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

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

4. J & H entered into agreements with the other respondents in which J & H obtained power equipment to perform cement hauling utilizing J & H's trailers.

5. The agreements entered into by J & H with Wallace and Harrod provided that Wallace and Harrod would lease their power equipment to J & H for compensation computed on the basis of cents per mile for each mile the tractor was driven. From that compensation 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. It was further agreed that from any and all compensation due lessor, the lessee should deduct the following operating expense items: drivers' wages, including all benefits required by union agreement; insurance paid by lessee; all taxes, including social security, workmens compensation, withholding tax; and any commission or rental fee due lessee. It was orally agreed by the parties to the written agreements that when J & H 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 J & H to do anything, or pay anything, until J & H 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.

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

7. The lease of tractors, when J & H exercised its option, did not provide for J & H to assume the complete control and responsibility for the motor vehicle.

8. Wallace, Ray, and Voight supplied to J & H power equipment and drove the leased equipment in performing transportation service for J & H.

9. Hollingsworth and Manderscheid supplied power equipment to J & H but did not supply drivers.

10. Harrod supplied power equipment to J & H and supplied drivers. The drivers supplied by Harrod were involved in 36 transportation hauls for J & H.

11. Wallace, Ray, Voight, and Harrod were subhaulers or underlying carriers within the meaning of Item No. 163 of MRT No. 10.

12. Wallace has charged less than the lawfully prescribed minimum rate in the instances set forth in Exhibit No. 7 amounting to $3,668.49. Ray has charged less than the lawfully prescribed minimum rate in the instances set forth in Exhibit No. 7 amounting to $286.50. Voight has charged less than the lawfully prescribed minimum rate in the instances set forth in Exhibit No. 7 amounting to $78.75. Harrod has charged less than the lawfully prescribed minimum rate amounting to $637.38.

13. J & H has by the use of the 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. J & H has violated the Public Utilities Code by paying to carriers utilized by it amounts different than the applicable rates and charges prescribed in Western Motor Tariff Bureau's Tariff No. 17.

15. Harrod, Ray, and Voight have violated 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.

16. Wallace, Harrod, Ray, and Voight have by the use of a lease device or arrangement violated the Public Utilities Code by permitting a 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.

17. Wallace, Harrod, Ray, and Voight have violated the Public Utilities Code and Item No. 163 of MRT No. 10 by charging and collecting from J & H amounts different than the applicable rates and charges prescribed by law.

18. 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. J & H violated Sections No. 453 and 458 of the Public Utilities Code and Items No. 163 and 165 of MRT No. 10.

2. Harrod, Ray, and Voight violated Sections No. 458, 494, 1063, 3621, 3664, 3667, 3668, and 3737 of the Public Utilities Code and Items No. 163 and 165 of MRT No. 10.

3. Hollingsworth and Manderscheid violated Item No. 165 of MRT No. 10.

4. Wallace violated Sections No. 3664, 3667, 3668, and 3737 of the Public Utilities Code and Items No. 163 and 165 of MRT No. 10.

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

6. Wallace, Harrod, Ray, and Voight should be ordered to collect from J & H 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: Wallace to collect $3,668.49; Harrod to collect $637.38; Ray to collect $286.50; and Voight to collect $78.75.

7. J & H should be ordered to pay to Wallace the amount of $3,668.49, to Harrod the amount of $637.38, to Ray the amount of $286.50, and to Voight the amount of $78.75, 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. The following named respondents should be ordered to pay the fines set forth opposite their names as provided by Section 3800 of the Public Utilities Code:

Harrod	$637.38
Ray	286.50
Voight	78.75

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. Ray and Voight 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. J & H Transportation Co. pay a fine of $5,000 on or before the fortieth day after the effective date of this order.

2. Edwin E. Wallace, Warren S. Harrod, Everett William Ray, and Roland E. Voight, shall take such action, including legal action to collect the undercharges due them from J & H Transportation Co., said amounts being Wallace - $3,668.49, Harrod - $637.38, Ray - $286.50, and Voight - $78.75, and shall notify the Commission in writing upon consummation of such collections.

3. J & H Transportation Co. shall pay to Edwin E. Wallace, Warren S. Harrod, Everett William Ray, and Roland E. Voight, the amounts of undercharges set forth in Ordering Paragraph No. 2.

4. The following named respondents shall pay the fines set forth opposite their names as provided by Section 3800 of the Public Utilities Code:

Warren S. Harrod	$637.38
Everett William Ray	286.50
Roland E. Voight	78.75

5. All respondents 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.

6. Everett William Ray and Roland E. Voight 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 on 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 Diego, California, this 3rd day of FEBRUARY, 1970.

William Symons, Jr.
President

Commissioners

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