

Decision No. 82911**ORIGINAL**

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of R & A TRUCKING
COMPANY to Strike Paragraph 10
of Amended Permit to Operate as
a Highway Contract Carrier.

Application No. 54384
(Filed October 12, 1973)

Titchell, Maltzman, Mark, Bass & Ohleyer,
by Haskell Titchell, Attorney at Law,
for applicant.

Arlo D. Poe, Attorney at Law, Herbert Hughes,
and Ed Bill, for California Trucking
Association, interested party.

T. H. Peceimer, for the Commission staff.

O P I N I O N

R & A Trucking Company (R&A), a California corporation, seeks an order from the Commission striking paragraph 10 in its amended highway contract carrier permit.^{1/} The Commission's staff (staff) opposes the application.

After duly published notice, public hearing on the matter was held before Examiner Bernard A. Peeters in San Francisco on January 11 and 22, 1974 and submitted on the latter date subject to the filing of late-filed exhibits due January 23, 1974. Said exhibits were timely filed and the matter is ready for decision.

The issue is whether R&A and The American Brass and Iron Foundry (AB&I) are so united in interest, management, and control as to make one the alter ego of the other.

R&A's presentation consisted of a thorough exposition of its organizational history, operations and all the relationships, corporate and familial, between itself and AB&I from pre-incorporation

^{1/} "(10) Whenever permittee engages other carriers for the transportation or property of The American Brass and Iron Foundry or customers or suppliers of said corporation, permittee shall not pay such carriers less than 100% of the applicable minimum rates and charges established by the Commission for the transportation actually performed by such other carriers."

to the present. This was accomplished through the testimony of five witnesses and the introduction of seven exhibits.

AB&I, a shipper, uses R&A for its transportation needs, although not exclusively. R&A performs the transportation of AB&I's property generally through the use of subhaulers who are paid an amount less than the charges accruing under the minimum rates. R&A charges the minimum rates and keeps the difference as its profit on the transportation.

AB&I's principal shareholder is Arnold Boscacci (Boscacci), who is also the president and a director of AB&I. Desiring to provide an independent source of income for his daughters, Boscacci suggested to them that they form a corporation and obtain a permit for the transportation of property. The suggestion was accepted and for the purposes of initial organization of the corporation, Boscacci advanced \$10,000 capital and the services of one of the officers of AB&I to act as president for organizational purposes. R&A was incorporated on October 11, 1972. Two thousand shares of \$1 par value were distributed to each of the following persons: Boscacci, and his three daughters, Ann Christine Stefani, Mary Jane Townsend, and Nancy McAuliffe, and his daughter-in-law, Patricia Boscacci, on or about November 27, 1972. The initial officers of R&A were: George H. Meyer, president and treasurer, Ann Christine Stefani, vice president, Melvyn I. Mark, secretary, and Patricia Boscacci, assistant secretary. On November 29, 1972 R&A applied to the Commission for a permit to operate as a highway contract carrier. The application stated that R&A was not affiliated, either directly or indirectly, by reason of common ownership, control, or management with any carrier or shipper. The permit was granted and issued on February 6, 1973. Trucking operations commenced in March 1973. The intercorporate restriction was made September 13, 1973.

Prior to the formation of R&A, AB&I utilized another carrier for some of its transportation needs. After R&A commenced operations, this traffic was tendered to R&A. AB&I also performed its own transportation with a leased truck and driver. The leased driver went to work for R&A as its manager.

On or about December 27, 1972, Arnold Boscacci transferred his shares in R&A to his wife, Rita, as custodian under the Uniform Gifts to Minors Act for his two grandchildren, Jeanne and Eric Lilienthal. At some later date, the 2,000 shares issued to Patricia Boscacci were redeemed by R&A at their initial price.

During an investigation by the staff, R&A sought to find out the purpose of the investigation and what, if anything, was wrong with its operation. Receiving no satisfaction from the staff, R&A sought the advice of a transportation consultant. The consultant's advice was that apparently the staff believed there was an alter ego relationship between R&A and AB&I and that to avoid any indicia of such relationship, all stock ownership in both corporations by the daughters should be separated, the common officer should be changed, and any other actions necessary to conclusively show there is not common control or management between the two corporations. Whereupon R&A immediately took action to correct the situation.

R&A's Exhibits 1 and 2 show the following with respect to the directors and officers of R&A and AB&I as of January 1, 1974:

R&A

Directors:

Ann Christine Stefani
Mary Jane Townsend
Frank Cole

Officers:

Ann Christine Stefani, Pres.
Nancy McAuliffe, Vice-Pres.
Melvin I. Mark, Secretary
Mary Jane Townsend, Treas.

Executive Committee:

Ann Christine Stefani
Frank Cole
Melvin I. Mark, Attorney
Larry P. Angeli, Accountant

AB&I

Directors:

Arnold Boscacci
Rita Boscacci
Allan Boscacci
George Meyer
Fred Stoltz
Melvin Gray
Kip Wixson

Officers:

Rita Boscacci, Chrmn/Board
Arnold Boscacci, Pres.
Allan Boscacci, Exec. V.P.
Melvin Gray, Secretary
George Meyer, Treas. &
Asst. Secty.

R&A alleges that whatever indicia there may have been of an alter ego was created through innocence and, in any event, there is no such relationship now, nor was one ever intended. Exhibits 5, 6, and 7 were introduced by R&A as further evidence that there is no alter ego relationship, nor any intention of deliberately creating such a relationship. These exhibits consist of documents which place the stock of AB&I owned by Ann Christine Stefani, Nancy Kathleen McAuliffe, and Mary Jane Townsend into escrow pending the outcome of this proceeding. The documents provide that if the Commission removes the restriction from R&A's permit, then the AB&I stock shall be transferred to Allan Boscacci, brother of the above parties. If the restriction is not removed, then the AB&I stock shall be returned to the original owners above.

R&A's manager presented Exhibit 3 to show that under the restricted operation it is losing money, whereas, prior to the restriction (September 13, 1973) the operation was profitable. R&A's manager testified that if the restriction is not removed, it will not be able to continue as a viable operation because, for the start-up period, it depends quite heavily on AB&I's traffic. This traffic is handled through subhaulers generally at alternatively applied rail rates to Los Angeles destinations. AB&I uses its own equipment to transport the more desirable traffic. R&A leases its equipment, claiming that this is more economical than owning. It leases one tractor, four sets of trailers and one pickup truck. It leases its office space from AB&I, and employs two drivers and one other person. One driver is leased to AB&I, under a standard lease, which is profitable to R&A. All dealings with AB&I are at arm's length. AB&I's freight bills are audited and paid by an outside transportation consultant. Claims against each other are filed in the normal course of business.

R&A, since the imposition of the restriction on its permit, has set up a separate account for other haulers, wherein it records the difference between the agreed subhaul charge and the charge

under the minimum rates. As of December 31, 1973 this account had a balance of \$16,700. Although the financial statements in Exhibit 3 show that R&A had retained earnings of \$13,308 at the end of December 1973, the notes to the financial statements indicate that no provision was made for the \$16,700 in the statements and that if the restriction is retained this amount will be payable to other carriers.

R&A's management is handled primarily by the executive committee and the day-to-day operations are handled by its manager, Frank Cole.

The family relationships involved in the two corporations are:

	<u>Children</u>	<u>Daughter- in-law</u>	<u>Grandchildren</u>
	--- <u>Ann Christine Stefani</u> - daughter		
	--- <u>Mary Jane Townsend</u> - daughter		
<u>Arnold Boscacci</u>	--- <u>Allan Boscacci</u> - son	<u>Patricia Boscacci</u> -	
<u>Rita Boscacci</u> - wife	--- <u>Nancy Kathleen McAuliffe</u> - daughter		
	--- <u>Lynne V. Lilienthal</u> - daughter		<u>Jeanne and Eric Lilienthal</u>

The staff's evidence consisted of the testimony of one witness and one exhibit. Subsequent to the issuance of the permit, (date unknown) the staff received information that there was an affiliation between R&A and AB&I. Investigation showed that R&A was transporting property for AB&I with the use of subhaulers; that AB&I's principal stockholder was Arnold Boscacci; that his daughters

are Ann Christine Stefani, Mary Jane Townsend, Nancy McAuliffe, and Lynne V. Lilienthal; that Rita Boscacci is the wife of Arnold Boscacci, and Patricia Boscacci is Arnold's daughter-in-law; that the daughters also held stock in AB&I; that George N. Meyer is a director, officer, and shareholder in AB&I as well as president of R&A. The period of investigation was from the beginning of R&A's operations (March 1973 through August 1973). R&A was called into the Commission's Oakland District office on July 10, 1973 for a conference with the staff. The result of the conference was a staff recommendation that R&A's permit be amended to include the restriction referred to in Footnote 1. The amended permit was issued September 13, 1973. The staff testified that it was not aware of R&A's activities to purge itself of all vestiges of a possible alter ego situation.

Discussion

The Commission has on numerous occasions resorted to the "alter ego doctrine" to curb the practice of using the corporate entity form of doing business as a device to avoid the payment of minimum rates. It has been Commission policy to place a subhauler restriction on carriers' permits where an alter ego relationship was found which was or could be used as a device to avoid minimum rate regulation.^{2/} Generally, this restriction is imposed only after a hearing, although in Kelley Trucking Co. (1969) 70 CPUC 25, 27, a subhauler restriction was imposed without a hearing, as was done to R&A. As used in Section 3668 of the Public Utilities Code, the word

^{2/} Premiere Transport (1962) 59 CPUC 337; Soule Transportation, Inc. (1962) 59 CPUC 260; Coast Trucking, Inc. (1962) 59 CPUC 339; Investigation of Herron Mills (1962) 59 CPUC 507; Investigation of Trans-Arrow, Inc. (1963) 61 CPUC 304; James R. Green (Jim's Trucking) (1964) 63 CPUC 425; J & V Trucking (1964) 63 CPUC 748; MacDonald & Dorsa Transportation Co. (1965) 64 CPUC 340.

"device" is to be interpreted so as to give the broadest possible protection to the minimum rate structure. It includes any arrangement whereby a person or corporation obtains transportation at less than the minimum rates. In issuing operating permits, where it appears that there is an affiliation between carrier and shipper by reason of common ownership, management, or control, it has been the Commission's policy to specify in such permits that not less than the applicable minimum rates shall be paid by such carrier to subhaulers engaged to carry the property of the affiliated company (J & V Trucking (1964) 63 CPUC 748, 753). Whether a carrier is used as a device whereby a shipper obtains transportation of property at rates less than the minimum rates is a question of fact that must be decided, not only on the ownership interest of the carrier and shipper, but also on the course of conduct of the carriers (Coast Trucking, Inc. (1962) 59 CPUC 339, 341).

It is not necessary, from the standpoint of enforcing minimum rates, that it be shown that a particular transaction has resulted in that which the statute condemns, but only that the transaction be reasonably susceptible of resulting in the evil sought to be avoided (Premiere Transport (1962) 59 CPUC 337, 339). Also, the Commission will consider that the shareholders of the carrier are related by blood or marriage to the shareholders of the shipper in determining that there is a common control, management, and arrangement between the two and that an alter ego relationship thus exists (DiSalvo Trucking Co. (1966) 66 CPUC 559, 562).

Applicant admits that certain indicia of an alter ego relationship existed at the outset. However, such indicia were the result of innocence rather than design. As soon as the import of this relationship in the regulatory scheme was recognized, R&A took immediate action to remove all such indicia. The incorporating president resigned, the principal shareholder of AB&I gave up his stock in R&A, R&A reacquired its stock from one of its shareholders,

and the shares in AB&I held by the shareholders of R&A were put in an irrevocable trust to be transferred away if the restriction is removed. Management and control of R&A is clearly vested in its manager and executive committee. There is no showing of influence by AB&I on the management of R&A, nor does it appear from the record that there is a reasonable susceptibility that the transactions between R&A and AB&I result in avoidance of the minimum rates. Transactions between the corporations are at arm's length. The more desirable traffic of AB&I is handled in its own equipment. Subhauling is resorted to by R&A because the destinations of shipments tendered by AB&I are not conducive to obtaining a backhaul. The only indicia of an alter ego remaining is the blood relationship between the shareholders of R&A and the principal shareholder of AB&I. It is a serious matter to ignore a corporate entity. Invoking the alter ego doctrine as a basis of imposing a restriction on a permittee's operations is equally serious and should be used only when the circumstances clearly justify its use. Subhauling is a recognized form of transporting property for compensation.

Standing alone, we are of the opinion that the authorities cited above do not require the finding of an alter ego relationship for regulatory purposes based only upon blood relationship. In DiSalvo the Commission, when finding that an alter ego relationship existed, considered blood relationship, but it did not rely solely upon this factor. It found common control and management, which is an essential element of the doctrine.

Findings

1. R&A is a completely separate and distinct corporate entity.
2. R&A is separately managed.
3. There is no common ownership of R&A by AB&I.
4. There is no common control or management.
5. No purpose to evade the minimum rates is shown, nor is there an inference of evasion; transactions between the corporation are at arm's length.

6. Blood relationship, standing alone, is insufficient to justify piercing the corporate veil for regulatory purposes.

We conclude that the restriction contained in paragraph 10 of R&A's amended highway contract carrier permit should be removed.

O R D E R

IT IS ORDERED that the restriction contained in paragraph 10 of R&A's amended highway contract carrier permit is removed.

The effective date of this order is the date hereof.

Dated at San Francisco, California, this 29th day of MAY, 1974.

Vernon L. Stenger
President
William J. Squire, Jr.
Alvin C. ...
...
Commissioners

Commissioner J. P. Vukasin, Jr., being necessarily absent, did not participate in the disposition of this proceeding.