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Decision No. 82948

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own motion into the operations, rates, and practices of APEX BULK COMMODITIES, a California corporation, DANIEL MONTOYA, doing business as MANAGEMENT, III, NOBLE F. MURDOCK, JOHN J. LANER, ROBERT R. BENNETT, III and RITCHIE FERRIER.	Case No. 9508 (Filed February 14, 1973)

Karl K. Roos, Attorney at Law, for Apex Bulk Commodities, and Robert Bennett, Ritchie Dennis Ferrier, Daniel E. Montoya, and Noble F. Murdock, for themselves, respondents.
James J. Cherry and James T. Quinn, Attorneys at Law, and Edward H. Hjelt, for the Commission staff.

O P I N I O N

On February 14, 1973, this Commission issued an order instituting an investigation to determine whether Apex Bulk Commodities (Apex), Daniel Montoya[1/] (Montoya), Noble F. Murdock (Murdock), John J. Laner (Laner), Robert R. Bennett (Bennett), and Ritchie Ferrier (Ferrier) violated Sections 458, 494, 1063, 3611, 3621, 3664, 3668, and 3737 by paying or charging rates less than those set forth in applicable minimum rate tariffs established by the Commission.

Public hearing was held before Examiner Daly at Los Angeles on April 25, 1973 and January 16, 1974, with the matter being submitted upon concurrent briefs filed on March 6, 1974.

1/ Hereinafter Montoya, Murdock, Laner, Bennett, and Ferrier will at times be referred to as corespondents.

Apex is presently engaged in the transportation of cement, sand, minerals, grain, and feed in dump trucks pursuant to a cement carrier certificate, and radial, contract, and dump truck carrier permits. Bennett and Ferrier hold radial and dump truck permits, which were in voluntary suspension during the period of the investigation. Montoya, Murdock, and Laner possess no operating authority from this Commission.

The evidence discloses that each of the five corespondents owns a tractor; that Apex entered into separate agreements with the corospondents covering the leasing of the tractors for use in the operations of Apex; and that each of the corespondents drove his own tractor and was compensated for the use of the vehicle and services on the basis of cents per mile, with a monthly minimum rental of $360.

The issue to be determined is whether the corespondents are in fact employees of Apex or subhaulers. If they are employees, then the staff concedes that the evidence fails to demonstrate any undercharges for the period of investigation, which covered the last six months of 1971. If, on the other hand, they are actually subhaulers, then Apex violated the Public Utilities Code by paying the subhaulers less than the applicable rates and charges prescribed by law, and the corespondents also violated the law by charging and receiving less than the applicable minimum rates and charges. The undercharges in such case would total $7,412.65 and would be assessed as follows: Montoya, $1,512.63; Murdock, $1,778.38; Laner, $567.76; Bennett, $1,355.13; Ferrier, $2,198.75.

The record indicates that Apex engaged the services of drivers, some of whom owned and leased tractors to Apex, as in the case of the five corespondents, and others who did not; that

all of the drivers were treated exactly alike; that each was on the payroll of Apex and was paid on a per mile basis for their services; that each received holiday and vacation pay; that Apex made deductions for state and federal withholding taxes, as well as for unemployment insurance taxes for each driver; that Apex made employer contributions to FICA, Workmen's Compensation, and hospitalization for each driver; that no driver was allowed to work for anyone else while on the payroll of Apex; and that all drivers were under the complete control and direction of the Apex dispatcher.

The record further indicates that the tractors leased to Apex by the corespondents were controlled by Apex; that they were exclusively used in the service of Apex during the lease period; that although each lessor-driver drove the vehicle he had on lease there were occasions when he would drive other vehicles and occasions when other drivers would drive his vehicle; and that when not in service all vehicles were kept at the Apex terminal.

The staff contends that the lease agreements are in effect prime carrier-subhauler pacts and that the ostensible employer-employee relationship between Apex and the corespondents is nothing more than an elaborate sham designed for the purpose of evading compliance with Minimum Rate Tariff 10, which requires a prime carrier to pay a subhauler 100 percent of the rates charged, and Minimum Rate Tariff 7, which requires a prime carrier to pay a subhauler 95 percent of the rates charged. The reason for staff's position is that each of the lease agreements contains a provision requiring the lessor to assume the maintenance and repair costs of the vehicle.

The staff relies upon Federal Cement Transportation Inc. et al. (1969) 70 CPUC 553, 558 where the Commission stated as follows:

> "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 borne 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 agreement 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."

Shortly after the Federal Cement decision the Commission by Decision No. 77072 dated April 14, 1970 in Case No. 8481 adopted General Order No. 130, which became effective January 1, 1971. General Order No. 130 sets forth the rules and regulations governing

the leasing of motor vehicles. Thereafter Apex, acting upon legal advice, executed the equipment lease agreements with the corespondents and said agreements assertedly were drafted so as to conform with the requirements of General Order No. 130.

General Provision F.2. of General Order No. 130 provides that a carrier which enters into a lease of a motor vehicle shall file a copy thereof with the Commission within five days thereafter. None of the agreements as set forth in Exhibits 7, 8, 9, 10, and 11 was ever filed with the Commission.

General Order No. 130, Part I, B(2) relates to the regulation of leasing between carriers and specifies that every lease "shall provide for the exclusive possession, use, supervision, direction, and control of the motor vehicle, and for the complete assumption of responsibility in respect thereto, by the lessee for the duration of the lease; except that if the lessor or an employee of the lessor does not operate the leased vehicle then the lease may provide that maintenance of the lessor vehicle shall be the lessor's obligation."

In considering the requirement that the lessee should assume the burden of maintenance the Commission followed the federal ruling as established in United States v Drum (1962) 368 US 370, 7 L ed 2d 360. The court was there concerned with an order of the Interstate Commerce Commission which held that individuals who leased their motor vehicles and hired their services as drivers to a shipper were subject to the permit requirements of the Motor Carrier Act of 1935. In Drum the shipper hired the tractors and the driver-owners on a mileage basis, without any guaranty of minimum mileage, and had the sole right to control the use of the tractors through the drivers. It paid for public liability and property damage insurance, conducted safety inspections, closely

directed all details of loading and delivery routes, instructed drivers regarding steps to be taken in emergencies, administered physical examinations, supervised the preparation of reports required by the Interstate Commerce Commission, paid social security taxes, withheld income taxes, and provided workmen's compensation. The drivers, as owners of the tractors, bore operating and maintenance costs and the risk of depreciation and damage. Although the court expressed the opinion that the operation possessed a number of the hallmarks of a genuine lease of equipment and a genuine employment arrangement, it held that the Interstate Commerce Commission did not exceed its discretionary power when it found that in substance the arrangement was an attempt by the shipper to pass certain burdens of a prior proprietary operation to the lessor-drivers, among which was the cost of maintenance and repair.

In Decision No. 77072 the Commission stated:

> "In our opinion the essential premise of Drum--passing to the owner-operators certain characteristic burdens of the transportation business--remains the same whether we are discussing a carrier-shipper arrangement or a carrier-carrier arrangement. Under the California regulatory scheme subhaulers are carriers and are required to be licensed by this Commission. In Drum, owner-operators who

> assumed certain characteristic burdens of the transportation business were held to be carriers; we hold the same way. It is immaterial whether these owner-operators deal with other carriers or with noncarriers; if they assume certain characteristic burdens of the transportation business when this motor vehicle is under lease they are required to be licensed by this Commission and conform to applicable tariffs. And one of those characteristics is the maintenance cost of the motor vehicle. By including a provision prohibiting lessor maintenance in certain circumstances we are not making new law, we are merely codifying which we consider to be the principal factor in Drum which caused the owner-operators to be subject to the ICC licensing requirements; a provision that we have already enforced in a leasing situation. (See Decision No. 76737, Investigation of J & H Transportation and Decision No. 76621, Investigation of Federal Cement.)"

An exception to the provision prohibiting lessor maintenance is contained in General Order No. 130, Part III, B(2) which specifies that every lease from a noncarrier to a carrier shall "provide for the exclusive possession, use, supervision, direction, and control of the motor vehicle, and for the complete assumption of responsibility in respect thereto, by the lessee for the duration of the lease; except that the lease may provide that maintenance of the motor vehicle shall be the lessor's obligations." (Emphasis added.)

General Order No. 130 defines "carrier" as every carrier as described in Section 3511[2/] of the Public Utilities Code and

2/ "3511. 'Highway carrier' means every corporation or person, their lessees, trustees, receivers or trustees appointed by any court whatsoever, engaged in transportation of property for compensation or hire as a business over any public highway in this state by means of a motor vehicle, except that 'highway carrier' does not include:

(a) Any farmer resident of this state who occasionally transports from the place of production to a warehouse, regular market, place of storage, or place of shipment the farm products of neighboring farmers in exchange for like services or for a cash consideration or farm products for compensation.

(b) Persons or corporations hauling their own property.

(c) Any farmer operating a motor vehicle used exclusively in the transportation of his livestock and agricultural commodities or in the transportation of supplies to his farm.

(d) Any nonprofit agricultural cooperative association organized and acting within the scope of its powers under Chapter 1 (commencing with Section 54001) of Division 20 of the Agricultural Code to the extent only that it is engaged in transporting its own property or the property of its members.

(e) Any person exclusively transporting United States mail pursuant to a contract with the United States government."

defines "Noncarrier" as every person, firm, or corporation engaged in any business enterprise except for-hire transportation of property.

The record fails to demonstrate that any of the five corespondents were engaged in the transportation of property for compensation or hire over any public highway in this state by means of a motor vehicle at the time of entering into their respective agreements with Apex. Montoya, Murdock, and Laner held no operating authority from this Commission and both Bennett and Ferrier requested the Commission to suspend their permits. It would appear, therefore, that in the absence of any evidence to the contrary that said corespondents must be considered as "noncarriers" and as such the agreements fall within the provisions of Part III of General Order No. 130, which specifies that a lease may provide that maintenance of the motor vehicle shall be the lessor's obligation.

In all respects the leases are exactly alike except for the Montoya lease, which provides for a payment of 11-3/4 cents a mile, whereas the others provide for 10-1/2 cents per mile. In conformity with the requirements of Part III of General Order No. 130, each agreement is in writing and was signed by the parties thereto prior to the beginning of the lease term; each provides for the exclusive possession, use, supervision, direction, and control of the motor vehicle by the lessee, except for maintenance; each specifically identifies the motor vehicle; each specifies the term of the lease; and each specifies a reasonable compensation to be paid by the lessee for the rental of the motor vehicle.

Looking beyond the terms of the lease and considering the actual operations conducted pursuant thereto, the record demonstrates that each of the driver corespondents was carried

on the books of Apex as an employee and each was treated exactly the same as other employee drivers, who leased no equipment to Apex; social security taxes, unemployment compensation premiums, and income tax withholding were paid by Apex for each; on occasions each of the corespondents drove other vehicles and on occasions other employees drove the vehicles of the corespondents; each of the corespondents was required to be available for work and could not refuse driving assignments; none of the corespondents could solicit backhauls; none of the corespondents could use his motor vehicle for the purpose of commuting between home and work; and when not in use, each vehicle was garaged at the terminal of Apex. It would appear therefore that no one other than Apex had any right to control, direct, and dominate the transportation and that none of the corespondents was in substance engaged in the business of transporting property for-hire.

After consideration, the Commission finds that:

1. Apex is presently engaged in the transportation of commodities in bulk in dump trucks pursuant to a cement carrier certificate and radial, contract, and dump truck carrier permits. Corespondents Montoya, Murdock, and Laner hold no authority from this Commission. Although corespondents Bennett and Ferrier each possessed radial and dump truck carrier permits, said permits were held in voluntary suspension. The record fails to demonstrate that any of the corespondents transported property for-hire by motor vehicle within the state at any time during the year 1971.

2. Shortly after General Order No. 130 became effective in January 1971, Apex, after seeking and obtaining legal advice, entered into separate agreements with the corespondents covering the leasing of tractors owned by the corespondents. Said leases were never filed with this Commission.

3. Each lease provided for a term of one year with a thirty-day written notice cancellation clause by either party. Each lease provided for a compensation on the basis of cents per mile, with a monthly minimum rental of $360; each was in writing and was signed by the parties thereto prior to the beginning of the lease term; each provided for the exclusive possession, use, suspension, direction, and control of the motor vehicle by the lessee, except for maintenance; and each specifically identified the motor vehicle.

4. Each corespondent was also employed as a driver by Apex and was paid on a per mile basis; each was treated exactly the same as other employee drivers who leased no equipment to Apex; each corespondent was entitled to paid holidays and vacations; social security taxes, unemployment compensation premiums, and income tax withholding were paid by Apex for each of the corespondents; on occasions each of the corespondents drove other vehicles and on occasions other employees drove the vehicles of the corespondents; each of the corespondents was required to be available for work and could not refuse driving assignments; none of the corespondents could solicit backhauls; none of the corespondents could use his motor vehicles for the purpose of commuting between home and work; and when not in use each vehicle was garaged at the terminal of Apex.

The Commission concludes that:

1. At the time each of the corespondents entered into his respective vehicle lease with Apex each was a "noncarrier" as defined by General Order No. 130, and each lease was subject to the regulations set forth in Part III thereof, which permits the lessor to assume the expense of maintenance.

2. Each of the leases complied with the requirements of Part III of General Order No. 130, except that said leases were never filed with this Commission; however, the order instituting investigation fails to charge Apex or the corespondents with violating General Order No. 130.

3. In each instance the relationship between Apex and the corespondents was in substance that of employer and employee, with Apex exercising complete control and direction of the equipment.

4. Based upon this record there were no violations by corespondents of Sections 458, 494, 1063, 3611, 3621, 3664, 3668, and 3737 of the Public Utilities Code nor of Minimum Rate Tariffs 7 and 10.

5. The investigation in Case No. 9508 should be dismissed.

O R D E R

IT IS ORDERED that:

1. The investigation in Case No. 9508 is dismissed.

2. Within five days after the effective date hereof, Apex Bulk Commodities shall file with this Commission copies of all lease agreements to which it is a party.

The effective date of this order shall be twenty days after the date hereof.

Dated at San Francisco, California, this 5th day of JUNE, 1974.

President

Commissioners