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ORIGINAL

Decision No. 84264

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own motion into the operations, rates, charges and practices of H. F. COX, INC., a California corporation, H. F. COX, an individual, HERCULES OIL COMPANY OF SAN DIEGO, INC., a California corporation, and EDGINGTON OIL COMPANY, a California corporation.

Case No. 9601
(Filed August 14, 1973)

H. F. Cox, for H. F. Cox, Inc., and himself, and James H. Lyons, Attorney at Law, for Hercules Oil Company of San Diego, Inc. and Edgington Oil Company, respondents.
James T. Quinn, Attorney at Law, and E. E. Cahoon, for the Commission staff.

O P I N I O N

This is an investigation instituted on the Commission's own motion to determine whether respondents H. F. Cox, Inc. (Cox Corp), a corporation, and H. F. Cox (Cox), an individual, violated Sections 3548, 3667, and 3668 of the Public Utilities Code and General Order No. 130, and whether respondents Hercules Oil Company of San Diego, Inc. (Hercules), a corporation, and Edgington Oil Company violated Sections 3548, 3667, 3668, 3669, and 3737 of the Public Utilities Code, General Order No. 130, and the terms of Hercules' highway carrier permit. At the heart of the matter is the issue of whether a lease-of-equipment arrangement was used as a device to circumvent the collection and payment of the applicable rates and charges prescribed in Items 140 and 400 of Minimum Rate Tariff 6-A. The matter came on for hearing at Bakersfield on February 27 and 28, 1974 before Examiner Pilling.

The case primarily involves consideration of the following section of the Public Utilities Code:

> "3548. The leasing of motor vehicles for the transportation of property to any person or corporation, other than to a highway carrier, is prohibited as a device or arrangement which constitutes an evasion of this chapter, unless the parties to such lease conduct their operation according to the terms of the lease agreement, which shall be in writing, and shall provide that the vehicle shall be operated by the lessee or an employee thereof and the operation and use of such vehicle shall be subject to the lessee's supervision, direction, and control for the full period of the lease. The lessor or any employee of the lessor shall not qualify as an employee of the lessee for the purposes of this section. . . ."

Evidence adduced at the hearing showed that Hercules, a corporation, was at all times pertinent herein a distributor of petroleum products as well as a motor carrier holding a petroleum irregular route carrier certificate, a radial highway common carrier permit, and a petroleum contract carrier permit issued by this Commission. For several years prior to January 1, 1968 Hercules maintained its own truck equipment and driver-employees at Bakersfield. One of those driver-employees also acted as dispatcher receiving his instructions from Hercules' office located at Long Beach. On January 1, 1968 respondent Cox, an individual noncarrier, leased 5 tank trucks and 5 tank trailers to Hercules at Bakersfield under a written agreement of indefinite duration cancellable on 15 days' written notice by either party. One of the provisions of the lease reads as follows:

> "4. During the term of this Lease, Lessee shall have sole control of said equipment, and all drivers and operators to be used in the operation of said equipment during the term of this lease shall be employed and their wages paid by Lessee, and shall be under the sole supervision and control of Lessee. . . ."

The lease required lessee to pay for and to carry public liability and property damage insurance on the leased vehicles and the lessor to furnish and pay for all fuel, oil, and tires and to repair and maintain the equipment. Shortly after entering into the lease with Cox, Hercules transferred its company-owned Bakersfield equipment to other of its stations in the state. Hercules' driver-employees at Bakersfield remained on Hercules' payroll and drove the leased trucks in Hercules' proprietary and carrier operations. The leased trucks were garaged and maintained on property owned or leased by Cox at Edison near Bakersfield. The Hercules driver-employee who acted as a dispatcher remained the driver-dispatcher in the Hercules Bakersfield operation until he suffered a heart attack some time after January 1, 1968. Cox thereafter took over as dispatcher of the leased vehicles and was paid a fee of $250 a month and expenses by Hercules for a period of time that extended at least through May, June, and July of 1972.

On January 1, 1971, the Commission's General Order No. 130 became effective. That General Order provides, among other things, that a carrier which enters into a lease shall file a copy of the lease with the Commission within five days after entering into the lease. The subject Cox-Hercules lease has never been filed with the Commission.

In July 1971 respondent Cox caused the incorporation of Cox Corp. and Cox became its president. On September 27, 1971 Cox Corp. was issued a contract carrier permit by this Commission authorizing it to transport petroleum products. Shortly thereafter Cox reregistered the leased vehicles in the name of Cox Corp. The subject Cox-Hercules lease was never changed to reflect the change in registration but remained on its face a lease between Cox the individual and Hercules.

In the latter part of 1972 a member of the Commission's staff audited the operations of Hercules, Cox, and Cox Corp. in

respect to the vehicles covered by the subject lease for the months of May, June, and July 1972 by examining the books and records of the companies and talking to the employees and heads of each company. At the hearing the staff investigator introduced copies of a quantity of those records which showed that the leased vehicles were used by Hercules during May, June, and July of 1972 to deliver several hundred truck-and-trailer loads of airplane jet fuel which Hercules had contracted to sell to the military f.o.b. destination. The records of Cox Corp. disclose that during May, June, and July of 1972 one of the leased trucks--truck No. 200--was used in the Cox Corp. for-hire operation on 74 different occasions; another of the leased trucks--truck No. 180--was used in the Cox Corp. for-hire operations on 23 different occasions; another of the leased trucks--truck No. 210--was used in the Cox Corp. for-hire operations on 2 separate occasions; and three of the leased trailers were used in the Cox Corp. for-hire operations a total of 27 times. Fifty-two of the Cox Corp. truck moves involved pickup or delivery or both pickup and delivery between the hours of 8:00 a.m. and 5:00 p.m. Of the 99 aforementioned Cox Corp. truck moves, 84 of the moves were driven by a total of 12 drivers employed and paid by Cox Corp., which drivers were regularly employed by Hercules during May, June, and July of 1972 as drivers of the leased vehicles in the Hercules operation. Cox, during the same three-month period, drove some of the leased vehicles in the Hercules proprietary operations nine times. Drivers' wages earned in the Cox Corp. operation were paid and duly reported by Cox Corp. while drivers' wages earned in the Hercules operation were paid and duly reported by Hercules.

Cox testified that he gave priority in the dispatching of vehicles to Hercules' business and that Cox Corp. performed no for-hire transportation for Hercules.

Further records submitted show that a single rental bill covering the 5 units was submitted to Hercules on a monthly basis. The letterhead on the bill for the May 1972 rental read "H. F. Cox Trucking" while the letterhead on the June and July 1972 bills read "H. F. Cox, Inc." Hercules' checks in payment of the rental bills were made payable to "H. F. Cox Trucking" for the May 1972 rental while the checks for June and July 1972 were made payable to "H. F. Cox, Inc." The rental bills set out, for each piece of equipment leased, the purported beginning and ending odometer reading and total miles operated computed by subtracting the beginning odometer reading from the ending odometer reading. The readings were taken by Cox. Only one beginning and one ending odometer reading was set out on the billing for each piece of equipment. There were no gaps shown between the beginning and ending readings for any piece of equipment which would have shown that a vehicle had been taken out of Hercules' service at some time during the month and placed in other service. However, a comparison of the ending odometer reading of the previous month with the beginning odometer reading on the subsequent month's bill in many instances revealed a mileage gap. For example, the ending reading on the May billing for Units Nos. 210-211A was 321,813 miles while the beginning reading for that unit shown on the June billing was 322,926 leaving an unexplained gap of 1,113 miles. Unit No. 200-216A shows a mileage gap of 4,340 miles between the same monthly bills. Unit 200, a tractor, was used in the Cox Corp. for-hire operation on May 10, 11, 12, 20, 25, and 27, 1972 yet the May billing to Hercules shows but one beginning and one ending odometer reading for that piece of equipment.

The Commission's staff witness testified that on one visit to the Cox Corp. lot the trucks he noticed there were all placarded with the Hercules placard. He also presented evidence to show that the major portion of revenue of Cox Corp. was derived from the lease of trucks and tractors to Hercules.

The president of Hercules testified that he originally set up the lease operation and that the first time he became aware that Cox was commandeering any of the leased vehicles for use in the Cox Corp. for-hire operation or that Cox was using Hercules drivers in the Cox Corp. for-hire operation was during the visit to the Hercules premises by the Commission's staff investigator in the latter part of 1972 and that upon becoming aware of the situation he ordered Cox to stop both practices. He also testified that he or his company was not aware until the staff visitation that there was a Cox corporation or that Cox had changed the registration of the leased vehicles from Cox to Cox Corp. He testified that Hercules carried and paid for the liability and property damage insurance on the leased vehicles and that the amount of the premium was not billed back to Cox nor to Cox Corp. but that as a favor to Cox he covered the leased vehicles on Hercules' insurance policy for collision, fire, and theft and that these premiums were billed back to Cox. He requested that if the Commission finds the operation to have been improper that any assessment of undercharges against his company be made on a volume tender basis and not a single shipment basis.

A witness from the Commission's Transportation Compliance and Enforcement Branch introduced a study showing what the for-hire charges would have been in accordance with Items 140 and 400 of Minimum Rate Tariff 6-A for each haul performed with the leased equipment by Hercules during the months of May, June, and July 1972. The total for-hire charges for all the hauls would have been $49,362. From this figure the witness subtracted $34,950 which was the total of all direct payments made by Hercules in connection with those hauls, including lease rental, drivers' wages and fringe benefits, and dispatching expense and arrived at the figure $14,412 as being the total amount of the alleged undercharges.

Discussion

On the nine occasions when Cox drove one of the leased vehicles in the Hercules noncarrier operation Cox, having furnished both the driver and the equipment for the moves, performed a transportation service for Hercules which required the assessment and collection of the applicable minimum rates. On those nine occasions Hercules was undercharged a total of $199.82.

On the remaining occasions Cox merely furnished equipment to Hercules, an activity to which our minimum rates do not attach. The staff, however, would have us apply the alter ego theory and find that Cox and the carrier Cox Corp. were one and the same person for the purpose of establishing the relation of carrier and shipper between Cox and Hercules to the end of requiring Hercules to pay $14,212.18 in alleged undercharges. To invoke the alter ego theory we would first have to find that the arrangement resulted in the performance of transportation for Hercules or that the arrangement resulted in Hercules obtaining an unlawful preference, rebate, or other prohibited economic benefit. We can make neither finding. Initially, the basic activity, namely, the leasing of vehicles without drivers by carriers to noncarriers, is not proscribed per se (see General Order No. 130, Part II) nor is such leasing alone considered an unlawful device to evade payment of our minimum rates. Simply stated, transportation service to which our minimum rates attach is performed when the person who furnishes the equipment is the same person who directly or indirectly furnishes the driver of the equipment. In this case Cox furnished the equipment only and Hercules furnished and paid the drivers--a situation which precludes the finding that Cox and/or Cox Corp. furnished transportation to Hercules. Nor does the fact that Cox dispatched the drivers in the Hercules operation change

the situation since Cox acted merely as a convenient conduit for orders from Hercules to its drivers for which Cox received separate remuneration. In regard to the matter of preferences, rebates, etc., there is no allegation or showing that the equipment rental charges were unreasonably low and no showing that Hercules received any forbidden preference or unlawful economic benefit under the arrangement. Even if we were to apply the alter ego theory the failure of the lessor(s) to live up to the terms of the agreement would not result in a finding under Section 3548 that the lessor(s) permitted and Hercules obtained the transportation of property at less than the applicable minimum rates in violation of Sections 3667, 3668, and 3669 since no transportation service was offered or performed by the lessor(s) and no unlawful preference, rebate, or economic benefit was given or received.

Findings

1. Cox Corp., of which Cox is president, is a corporation holding a highway carrier permit issued by this Commission to operate as a petroleum contract carrier and had been duly served with appropriate tariffs and distance tables.

2. Cox Corp. was the registered owner of five trucks and trailers which it acquired subject to a lease which had been entered into between Hercules as lessee and Cox, the former registered owner of the vehicles, as lessor, several years prior to the incorporation of Cox Corp.

3. Hercules is a corporation engaged in the business of selling and distributing petroleum products, and also in the for-hire transportation of petroleum products under a permit issued by this Commission.

4. Paragraph 4 of the subject lease read in part: "During the term of this Lease, Lessee shall have sole control of said equipment, and all drivers and operators to be used in the operation of said equipment during the term of this Lease shall be employed and their wages paid by Lessee, and shall be under the sole supervision and control of Lessee..."

5. Hercules had no knowledge that Cox Corp. held highway carrier authority from this Commission nor that Cox had transferred registered ownership of the vehicles from himself to Cox Corp. subsequent to entering into the lease with Hercules.

6. Drivers in the Hercules operations were original and bona fide employees of Hercules and were furnished and paid by Hercules.

7. Cox, without the knowledge or consent of Hercules, caused six pieces of the leased equipment to be used in the Cox Corp. for-hire operation a total of 126 times and caused Cox Corp. to employ and pay 12 off-duty regular Hercules drivers on 84 occasions to drive those vehicles in the Cox Corp. for-hire operation.

8. Except as set out in Findings 9 through 14:

a. The subject lease as well as the actual arrangements under the lease never amounted to more than a "bare equipment" arrangement between Hercules and Cox whereby Cox was to furnish equipment only to Hercules.

b. No economic benefit was shown to have inured to Hercules by reason of the use of the leased vehicles in the Cox Corp. for-hire operation, nor was there allegation that the rental charges were unreasonably low.

c. Neither Cox nor Cox Corp. engaged in transportation for Hercules nor any activity requiring the assessment of minimum rates.

d. Neither Cox nor Cox Corp. unlawfully assisted, suffered, or permitted Hercules to obtain transportation of property at less than the applicable minimum rates and charges, in the amount of $14,412 or any other amount.

e. Hercules did not seek to obtain nor did it obtain transportation of property at less than the applicable minimum rates.

f. As between Cox and Hercules, Cox's principal business was the leasing of motor vehicles without drivers, a situation which exempted Cox, pursuant to General Order No. 130, General Provisions I.1., from having to file a copy of the vehicle lease with the Commission.

9. Cox drove and was paid by Hercules for driving several of the leased vehicles in the Hercules proprietary operation on nine different occasions, the moves being identified as Hercules delivery receipts Nos. 44301, 44319, 44314, 44326, 44372, 44375, 44567, and 44612.

10. In supplying both the equipment and manpower to make the moves set out in Finding 9, Cox became a highway carrier.

11. The employment of Cox by Hercules to drive the leased vehicles in the Hercules proprietary operation for the moves set out in Finding 9 is prohibited by Section 3548 of the Public Utilities Code as a device constituting an evasion of Chapter 1, Division 2 of the Public Utilities Code, specifically Section 3669, in that Hercules unlawfully obtained transportation of property at less than the applicable minimum rates and charges.

12. The employment of Cox by Hercules to drive the leased vehicles in the Hercules proprietary operation for the moves set out in Finding 9 is prohibited by Section 3548 of the Public Utilities Code as a device constituting an evasion of Chapter 1, Division 2 of the Public Utilities Code, specifically Sections 3667 and 3668, in that Cox charged and received from Hercules less than the applicable minimum rates and charges for the nine moves set out in Finding 9 and through the device of the lease arrangement assisted, suffered, and permitted Hercules to obtain the transportation of Hercules' property at less than the applicable minimum rates and charges, which full applicable rates and charges remain unpaid.

13. The minimum rates and charges applicable to the moves set out in Finding 9 are found in Items 140 and 400 of Minimum Rate Tariff 6-A and the distance table.

14. The moves described in Finding 9 would have resulted in a payment of $1,306.76 by Hercules under the applicable minimum rates and charges. Total payout by Hercules covering the moves set out in Finding 9 was only $1,106.94 (rental payment, wages, pensions, etc.) leaving an underpayment of $199.82.

15. Cox should be ordered to collect undercharges of $199.82 from Hercules and should pay a fine in that amount to this Commission pursuant to Public Utilities Code Section 3800.

16. Cox should pay a fine to this Commission pursuant to Public Utilities Code Section 3774 in the amount of $150.

17. No evidence was submitted concerning improper conduct on the part of Edgington Oil Company.

Conclusions

1. Cox and Hercules violated Section 3548 of the Public Utilities Code on those occasions described in Finding 9.

2. Cox violated Sections 3667 and 3668 of the Public Utilities Code on those occasions described in Finding 9.

3. Hercules violated Section 3669 of the Public Utilities Code on those occasions described in Finding 9.

4. Cox should be ordered to collect undercharges of $199.82 from Hercules.

5. Cox should be fined in the amount of $199.82 pursuant to Public Utilities Code Section 3800.

6. Cox should be fined in the amount of $150 pursuant to Public Utilities Code Section 3774.

7. Edgington Oil Company was not shown to have engaged in any violation of the Public Utilities Code.

8. Except as set out in conslusions 1, 2, and 3 neither Cox nor Hercules violated the provisions of the Public Utilities Code in General Order No. 130.

The Commission expects that Cox will proceed promptly, diligently, and in good faith to pursue all reasonable measures to collect the undercharges. The staff of the Commission will make a subsequent field investigation into such measures. If there is reason to believe that Cox or his attorney has not been diligent, or has not taken all reasonable measures to collect all undercharges, or has not acted in good faith, the Commission will reopen this proceeding for the purpose of determining whether further sanctions should be imposed.

O R D E R

IT IS ORDERED that:

1. H. F. Cox shall pay a fine of $150 to this Commission pursuant to Public Utilities Code Section 3774 on or before the fortieth day after the effective date of this order. H. F. Cox shall pay interest at the rate of seven percent per annum on the fine; such interest is to commence upon the day the payment of the fine is delinquent.

2. H. F. Cox shall pay a fine to this Commission pursuant to Public Utilities Code Section 3800 of $199.82 on or before the fortieth day after the effective date of this order.

3. H. F. Cox shall take such action, including legal action, as may be necessary to collect the undercharges set forth in Finding 15, and shall notify the Commission in writing upon collection.

4. H. F. Cox shall proceed promptly, diligently, and in good faith to pursue all reasonable measures to collect the undercharges. In the event the undercharges ordered to be collected by paragraph 3 of this order, or any part of such undercharges, remain uncollected sixty days after the effective date of this order, respondent shall file with the Commission, on the first Monday of each month after the end of the sixty days, a report of the undercharges remaining to be collected, specifying the action taken to collect such undercharges and the result of such action, until such undercharges have been collected in full or until further order of the Commission. Failure to file any such monthly report within fifteen days after the due date shall result in the automatic suspension of H. F. Cox's operating authority until the report is filed.

5. H. F. Cox shall cease and desist from charging and collecting compensation for the transportation of property or for any service in connection therewith in a lesser amount than the minimum rates and charges prescribed by this Commission.

The Secretary of the Commission is directed to cause personal service of this order to be made upon respondent H. F. Cox and to cause service by mail of this order to be made upon all other respondents. The effective date of this order as to each respondent shall be twenty days after completion of service on that respondent.

Dated at San Francisco, California, this 1st day of APRIL, 1975.

Vernon L. Sturgeon, President

William Symons, Jr.

Leonard Ross

Commissioners

Commissioner ROBERT BATINOVICH

Present but not participating.