

Decision No. 86000

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

WINTON JONES CONTRACTOR, INC., }
for hearing of Finance and }
Accounts Division Audit }
No. 6796. }

Application No. 55428
(Filed January 2, 1975)

Silver, Rosen, Fischer & Stecher, by Michael J. Stecher, Attorney at Law, for Winton Jones Contractor, Inc., respondent.
T. H. Peceimer, for the Commission staff.

O P I N I O N

Applicant Winton Jones Contractor, Inc. (Jones), a corporation, requested a hearing for the purpose of determining whether it is liable for the payment of \$5,166 in fees which the Commission staff, as a result of an audit of Jones' operations, contends Jones owes to the Transportation Rate Fund pursuant to Section 5003.1, Chapter 6, Division 2, of the Public Utilities Code covering certain transportation performed by Jones during the period 1971 through 1973. A hearing was held on the matter May 22, 1975 and January 26 and 27, 1976, at San Francisco before Examiner Pilling.

Pertinent portions of Section 5003.1 read as follows:

"...every person or corporation owning or operating motor vehicles in the transportation of property for hire upon the public highways under the jurisdiction of the commission shall, between the first and fifteenth days of January, April, July, and October of each year, file with the commission a statement showing the gross operating revenue derived by such person or corporation from the transportation of property for the preceding

three calendar months...[and]...shall, at the time of filing such report, pay to the commission a fee equal to one-third of 1 percent of the amount of such gross operating revenue; ..."

The staff contends that Jones transported certain hazardous and nonhazardous petroleum refinery and chemical plant wastes on a for-hire basis, that such transportation was subject to the jurisdiction of the Commission, and that Jones failed to report the gross operating revenue it derived therefrom on the Commission's prescribed form - Quarterly Report of Gross Operating Revenue (Exhibit 6) - or to pay the required fee pursuant to Section 5003.1. Jones contends that hauls were proprietary carriage in that Jones takes title to the subject waste at point of pickup and therefore Jones' act of hauling the waste was not for-hire transportation subjecting it to the payment of fees required by Section 5003.1. According to the staff witness the amount of money involved on which fees should have been paid is \$1,434,959. Jones possesses a radial highway common carrier and dump truck permits issued by the Commission.

The evidence shows that Jones is a contractor specializing in industrial work. It does considerable contracting work in and around oil refineries and chemical plants located in Contra Costa and Solano Counties and performs outside jobs such as road building, dam building, earth moving, and other construction. During the period 1971 through 1973 its gross revenue was \$16 million. In addition to numerous pieces of contractors' equipment, Jones operates a 110-barrel capacity vacuum tank truck and a 30- to 40-barrel capacity dumpster container truck which Jones used for, among other things, hauling wastes from petroleum refineries and chemical plants and for hauling contaminant spill from leak sites. Jones' president testified that some of the wastes Jones hauls are waste coke,

sulphur tar, lime sludge, sludge oils and greases, oily water, sewer water, alkaline waste, acid waste, cinders, and scale. Jones' witness claims that Jones takes title to the waste at point of origin under an arrangement with the disposer of the waste. Jones contends that the disposer of the waste disposes or abandons the waste to Jones and that Jones can do whatever it wants to with the waste, subject only to applicable health and safety laws. An example of the written arrangement under which Jones comes into possession of the waste is set out in Exhibit 3, which is a purchase order (sic) issued in 1969 to Jones by Humble Oil and Refining Company, now Exxon U.S.A. (Exxon), whose refinery is located in Solano County, which arrangement is claimed by Jones and Exxon to be still in effect.

Salient portions of that writing are as follows:

Scope:

Furnish that portion of our requirements of the following which may be released from you during the period 8/1/69 through 8/31/69:

Vacuum Tank Truck Services

Price:

Labor and removal equipment rates

- | | |
|---------------------------------------------------|--------------------|
| 1. 110-barrel capacity vacuum truck | /truck/hr. \$18.00 |
| 2. 30-40 barrel capacity dumpster container-truck | /truck/hr. \$18.00 |
| 3. Overtime labor & equipment rate | /truck/hr. \$22.25 |
| Disposal charge - not to exceed/barrel | \$ 0.50 |

Additional Conditions and Instructions:

1. Price change notices in duplicate shall be sent to this office 10 days prior to proposed effective date.

2. Shipping Releases: Shipping releases will contain complete shipping instructions and may be issued by purchasing, refinery stores, and the following authorized Humble personnel:

R. C. Anderson	C. J. Steed	L. A. Seamans
L. L. Brennan	D. Sigourney	J. H. Gattens
V. C. Coffin	L. M. Stagich	A. A. Verhaeghe
J. D. Cooper	C. J. Brabec	

Services are to be performed when and as requested. This purchase order number and the applicable shipping release number must be shown on all shipping papers and invoices.

3. Shipping releases are to be issued to contractor as follows:

Routine and emergency: Concord Office
415/682-1870

Contractor maintains personnel or answering service on duty at this telephone number at all times.

4. Waste Materials: All materials disposed of at off-site locations from Humble's property, ownership and title to all such waste materials, and all responsibility and liability in connection therewith shall vest in contractor at the time when the waste material is loaded into contractor's removal equipment.
5. Compliance With Laws: Contractor agrees to comply with all federal, state, county, and municipal laws, orders, and regulations in connection with the work to be performed hereunder and to indemnify and hold Humble harmless from any liability arising from any alleged violation of such laws, orders, or regulations by contractor.
6. Humble's "Independent Contractor's and Safety, Plant Protection and Traffic Clause (19)" is attached hereto and made a part of this order.

This order may be cancelled without penalty by either party.

When a Jones truck picks up a load of waste at Exxon, the driver of the truck is given a "Material Pass and Shipping Memorandum" document by an Exxon employee which is used as a gate pass to get the truck through Exxon's gate. The property covered by the document is stated on the document to be the "Personal Property of Bearer", the named bearer on the document being Jones. A typical billing by Jones to Exxon covers ten movements of spent caustic (Exhibits 9 and 10) on November 11, 1973 and is as follows:

CC #3015

110 Barrel Vacuum Truck	232 Hours @ \$20.05	\$ 4,651.60
Teamster overtime	88 Hours @ 4.65	409.20
Teamster overtime, Sunday, holiday	44 Hours @ 9.30	409.20
Dump fees: 22,220		
barrels @ 50¢		11,110.00
Bridge tolls		36.00
		<u>\$16,616.00</u>

All bills submitted by Jones to Exxon include the item "dump fees: ... @ 50¢". Not all the bills include an item for "bridge tolls". Jones always charged for dump fees whether or not it took the material to a disposal site. The witness for Jones testified that Jones did not always charge in accordance with the hourly rates set out in the purchase order but charged Exxon whatever Jones thought would keep Exxon happy. The witness also testified that Jones picked and chose the waste it wanted to haul even though the contract states that "Services are to be performed when and as requested" by Exxon. Jones sold, traded, and recycled some of the waste it hauled and in some cases used the waste in connection with construction projects it was working on. For example, sludge oil is alleged to have been used to oil roads in construction projects. Jones also stored some of the waste. Waste not sold, traded, recycled, used, or stored was disposed of principally at the J&J Disposal, Inc. (J&J),

a company at the time affiliated with Jones which operated a Class 1 Dump Facility set up to receive hazardous and extremely hazardous waste material in Solano County. Jones also disposed of the waste at three other disposal sites in Contra Costa County. The witness for Jones was unable to give any indication of the amount of waste Jones sold, traded, recycled, used, or disposed of, though the witness stated that Jones paid taxes on the waste it stored. The witness claims that Jones kept no records of the amount of waste it recycled, sold, traded, used, or stored.

At the end of 1973 J&J ceased to be affiliated with Jones. In an effort to determine the quantity of waste which Jones dumped as compared with the quantity Jones allegedly sold, used, or traded, the staff sought to obtain J&J's records for the period 1971 through 1973 but were told by employees of the new owner of J&J that J&J only possessed the records for the period December 1973 to the present. The staff then made abstracts to Jones' billing to Exxon for that time period for waste removal and checked the Industrial Waste Haulers Reports at the offices of J&J which listed Jones as a waste hauler and made a comparison of the quantity of the waste for which billing was made to Exxon and the quantity appearing on the Industrial Waste Haulers Reports on which Jones was listed as the waste hauler. The comparison appears on Exhibit 13, introduced into evidence over Jones' objection, and shows that over 99 percent of the waste moved by Jones from Exxon went to J&J in 1974. Both Exxon and Jones contend that the waste has no value.

A witness for Exxon who actively participated in the preparation of the Exxon-Jones agreement testified that the intent of paragraph 4 under section headed "Additional Conditions and Instructions" was to transfer ownership of the waste at the time the waste is loaded into the Jones' removal equipment thus transferring the responsibility for the disposal of the waste from Exxon to Jones.

The witness stated that Exxon has never directed Jones to dispose of the material at any specific point, and that his company does not know or care where the waste goes once Jones carries it away, though Exxon has a continuing interest that the waste is disposed of according to law and that Jones disposes of the waste at the closest possible site unless Jones has a valid reason for not doing so, because Exxon is being charged on an hourly rate. The Exxon witness stated that payment under the Exxon-Jones contract to Jones was made for the service of disposal, and at the same time transfer of the ownership to Jones is made because the waste has no value and to relieve Exxon of liability for wrongful disposal. The Exxon witness testified as follows:

"Q. You desire him to transport it to the most available site that you're charged for or possibly charged for?

"A. That is all we hope. If it happens to be a problem, we would certainly listen to him.

"Q. But you would expect him to take it to the closest possible site?

"A. Yes. We are very much interested in economies, yes."
(Transcript pp. 196-7.)

"Q. . . . Under price, the disposal charge, not to exceed/barrel [sic]. What was this charge put in the contract for?

"A. The movement of material is on an hourly basis and the dumping is on per barrel." (Transcript pp. 197-8.)

Jones argues that the waste is abandoned to Jones at the point of origin of the haul by the disposer and at that point Jones takes title to and full control over the waste, and is hauling his own property. Jones claims that it is a waste collector and, like a trash or garbage collector who removes trash from an owner's premises, takes title to the material. Jones also contends that the subject hauling is done in connection with Jones' primary business of contracting. Jones likens his operation to a legitimate buy-and-sell operation.

Discussion

In Wm. H. Hutchinson & Sons, Inc. (1972) 73 CPUC 771, the Commission found and concluded that oil well waste is property within the meaning of the first paragraph of Section 3511 of the Public Utilities Code and that the for-hire transportation of such property could not lawfully be performed without operating authority from this Commission and without the carrier observing the minimum rate tariff provisions applicable to such transportation. We reach the same conclusions concerning the waste products hauled by Jones for the reasons stated in the Hutchinson case.

Concerning the issue of proprietary carriage versus for-hire carriage, it was Exxon who engaged and paid a monetary consideration to Jones for the removal of the waste. No sale or purchase was involved. According to the Exxon witness the movement of material is charged for an hourly basis and the dumping is charged for by the barrel. The Exxon witness also stated that under the arrangement with Jones, Exxon expected Jones to take the waste to the closest available disposal site but "If it happens to be a problem we would certainly listen to him". Thus Exxon paid Jones on an hourly basis to move the waste over the public highways by truck to the closest disposal site, namely, J&J's dump, with Exxon retaining the right to veto the disposing of the waste at a more distant dump. These

circumstances contain all the elements necessary to conclude that the moves constituted for-hire transportation despite the clouding of the issue by paragraph 4 of the written purchase order which merely gives the illusion that Jones took title.

Jones claims that it recycled, sold, traded, used, or stored an extensive but unknown quantity of the waste, but because Jones kept no record of such transactions Jones was unable to indicate the extent of such activity. On the other hand, the staff showed that for the year December 1973 through November 1974, at least, Jones disposed of over 99 percent of the waste Jones hauled out of Exxon at the J&J dump. The witness for Jones gave no explanation for the abrupt change in the practice of recycling, selling, trading, using, or storing a substantial amount of the waste during 1971 through 1973 to dumping practically all the waste Jones hauled for Exxon in 1974. We conclude that the amount of waste which Jones recycled, sold, traded, used, or stored during 1971 through 1973 was similar in amount to that which Jones did in 1974, namely, practically none.

Findings

1. The Commission staff audited Jones' operation for the years 1971 through 1973 for compliance with Section 5003.1 of the Public Utilities Code regarding the payment of the fee of 1/3 of 1 percent of Jones' gross operating revenue derived from for-hire transportation over public highways under the jurisdiction of the Commission as required by that section.

2. As a result of that audit the staff concluded that Jones had failed to pay the subject fee on approximately \$1,434,959 gross operating revenue derived predominately from the transportation of waste from petroleum refineries and chemical plants which the staff claimed moved in Jones' for-hire transportation service under the jurisdiction of this Commission.

3. Jones possesses radial highway common carrier and dump truck permits issued by the Commission.

4. Petroleum refinery wastes and chemical plant wastes are property within the meaning of the first paragraph of Section 3511 of the Public Utilities Code.

5. Shippers pay Jones an hourly rate for the movement of wastes over public highways by truck to an appropriate disposal site closest to the point of pickup and is paid a dump fee by the barrel.

6. The original owner of the waste retains the right to veto the disposal of the waste at a site more distant than the disposal site closest to the point of pickup and thus the shipper exercises an effective and continued control over the movement of the waste.

7. The transportation of wastes by Jones is for-hire transportation over public highways and is subject to the Commission's jurisdiction, and the gross operating revenue derived therefrom by Jones should be reported to the Commission on the form "Quarterly Report of Gross Operating Revenue" and the percentage fee as prescribed in Section 5003.1 of the Public Utilities Code is required to be paid on such gross operating revenue.

8. The fees required to be paid by Jones in Finding 7 have not been paid.

Conclusions

1. The transportation by Jones of waste from petroleum refineries and chemical plants during the years 1971 through 1973 as revealed in the staff's audit constituted for-hire transportation over public highways and was subject to the Commission's jurisdiction.

2. The percentage fees required to be paid by Section 5003.1 of the Public Utilities Code should have been paid on the gross operating revenue derived by Jones covering the transportation by Jones set out in Conclusion 1 but were not paid.

3. Jones should be ordered to pay the percentage fees set out in Conclusion 2 plus a 25 percent penalty.^{1/}

O R D E R

IT IS ORDERED that Winton Jones Contractor, Inc. shall pay the percentage fees required to be paid by Section 5003.1 of the Public Utilities Code on the gross operating revenues derived by Jones from the transportation by Jones of waste from petroleum

^{1/} The exact amount of fees due and penalty cannot be computed from the evidence on this record because Jones did not cooperate with staff investigators and did not give the staff investigators his complete records. Jones is admonished that his failure to produce his books and records for Commission inspection may result in revocation of his permits (P.U. Code Sections 3701, 3705, 3706, 3774).

refineries and chemical refineries over public highways during the years 1971 through 1973 as revealed by the staff's audit, or reaudit, plus a penalty of 25 percent of such fees in the amount of \$5,166, which includes the fees and penalty, within ninety days from the date hereof.

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

Dated at San Francisco, California, this 29th
day of JUNE, 1976.

I abstain
William Sproule Jr.
Commissioner

President

Vernon L. Stenger

I. Ross

Robert Bateman
Commissioners

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