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Decision No. 86217

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

INDUSTRIAL COMMUNICATIONS SYSTEMS
INC., a California corporation,

Complainant,

vs.

Case No. 9722

RADIO DISPATCH CORP., a California
corporation, GENERAL TELEPHONE
COMPANY OF CALIFORNIA, a California
corporation, CONTINENTAL ANSWERING
SYSTEM, DIAL ANSWERING & SECRETARIAL
SERVICE, AND FIRST DOE through SIXTH
DOE,

Defendants.

ORDER DENYING REHEARING OF AND
MODIFYING DECISION NO. 84820

On August 26, 1975, the Commission issued Decision No. 84820, which found that Radio Dispatch Corp. (RDC) and its principals Richard A. Howard and Carl B. Hilliard were guilty of contempts of the Commission by operating RDC in violation of Decision No. 81766. It was ordered that their contempts should be punished by the payment of a fine of \$1,000 each. RDC and Richard A. Howard subsequently paid their fines. On September 5, 1975, Carl B. Hilliard, Jr. filed a petition for rehearing of Decision No. 84820 as it applies to him. The petition for rehearing was filed in sufficient time to stay Decision No. 84820. By a subsequent order dated October 24, 1975, in Decision No. 85078, the Commission, on its own motion, extended the stay until further order of the Commission for the sole purpose of affording the Commission sufficient time to evaluate fully the contentions set forth in the petition for rehearing.

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The requirements of notice of the alleged contempt and a hearing has been satisfied.

Petitioner Hilliard had notice of the facts constituting the alleged contempt by RDC with respect to violations of Decision No. 81766. He has been the attorney for, 50 percent shareholder, a director and vice president of RDC since 1968. He represented RDC and was the principal witness for RDC in proceedings before this Commission in Case No. 9832 in which Decision No. 81766 was rendered. He was an attorney for RDC in the instant proceeding as well as a witness. It is our finding and conclusion that petitioner Hilliard has at all times known of the limitations on the operations of RDC in Decision No. 81766 and has been aware of the complaint and issues raised by complainant Industrial Communications Systems, Inc. (ICS) throughout the proceedings herein. At several places in the record the presiding examiner stated that he considered the proceedings to be a contempt proceeding with respect to the corporate officers as well as the corporation (Tr. 222, 224, 229 and 325). Accordingly, petitioner Hilliard has had notice of the facts constituting the alleged contempt and was afforded full procedural safeguards including the opportunity to be heard and to participate in his own defense.

Corporate officers and directors may be held in contempt for violation of orders directed against the corporation if they have notice of the order. Parker v. United States, 126 Fed.2d 370 at 374 (1942); Dyke Water Co., 63 CPUC 76 (July 1964); Walnut Trucking Company, et al., 66 CPUC 262 at 265 (October 1966); compare Decision No. 83298, Case No. 9651. In the matter of Peninsula Radio Secretarial Service, Inc., v. San Mateo County Medical Society, et al. (Mimeo, August 1974). Accordingly, even though Hilliard was not named in the complaint seeking a finding of contempt against RDC, as a corporate officer and director, he may be subject to a finding of contempt for violation of Commission orders directed against the corporation.

The record supports the finding of contempt with respect to the petitioner herein.

Contempt is established by (a) proof of the order, (b) the alleged contemner's knowledge of the order, and (c) his failure to comply with it. (In re Sigesmund, 193 Cal. App.2d 219 at 224). The record is abundantly clear that Mr. Hilliard had knowledge of Decision No. 81766 from shortly after the time it was issued in September 1973. The record also shows that Mr. Hilliard did not agree with Decision No. 81766, nor did Mr. Richard Howard, the only other shareholder, director and officer of RDC. Shortly after Decision No. 81766 was issued Mr. Hilliard became inaccessible to Mr. Howard, who is responsible for day-to-day operations of RDC. Howard and RDC have not contested our finding of contempt with respect to them in Decision No. 84820 and have paid their fines.

In cases where one of the directors or officers is participating in acts of misconduct and other directors know, or, as reasonable directors, exercising due care, should know of this misconduct, the director must protest or show steps taken to prevent the injury from resulting to be free from liability (San Leandro Canning Co., Inc. v. Perillo, 84 Cal.App 627 (1927); Vujacich v. Southern Chemical Co., 21 Cal.App 439 (1913); Mercer v. Duncomb, 110 Cal.App 28 (1930)). The board of directors either must know or be presumed to know the acts and doings of its subordinates in and about the affairs of the corporation (First National Finance Corporation v. Five-O Drilling Co., 209 C. 569 (1930)). Accordingly, the record compels our conclusion that in view of Mr. Hilliard's duty as a director of RDC, to know of the operations of RDC and to take timely action to protest or show steps taken to prevent operations by RDC in violation of Decision No. 81766, Mr. Hilliard's failure to take action during the eight months before the complaint was filed herein was a furtherance of the contempt.

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While the uncontroverted inaccessibility of Mr. Hilliard from Mr. Howard following the issuance of Decision No. 81766 may not have been a willful avoidance of actual knowledge of the operation of RDC, in violation of Decision No. 81766, his failure to keep himself informed of the operations of RDC cannot be excused on the grounds of imprudence or an error of judgment (Burt v. Irvine Co., 237 Cal.App 2d 828 at 852 (1965)). Considering the public utility character of the company's operations and the fact that Mr. Hilliard is a seasoned public utilities lawyer in the field of RTU operations, it is reasonable to find that even though it appears Mr. Hilliard had no actual knowledge of the violations of the Commission's order, he should have known of such violations through the exercise of due diligence. Mr. Hilliard cannot avoid responsibility for the wrongful acts of the company by lack of diligence or by avoiding knowledge of the utility company's operations. This is particularly so where, if ordinary diligence had been exercised, knowledge of the unlawful actions could have been reasonably obtained. The violation of Decision No. 81766 was so obvious, through the use of answering services outside the certificated area authorized in Decision No. 81766 and through the use of two FEX lines and a WATS line, subsequent to August 24, 1973 (Decision No. 84820, finding no. 10, Mimeo p. 7), Mr. Hilliard could have discovered the unlawful operations without much difficulty, if any at all. Accordingly, we find and conclude that Mr. Hilliard had full knowledge of Decision No. 81766 and failed to take any action to assure compliance with the order in his capacity as director, officer and attorney for RDC.

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The contemner has the burden of proving inability to comply with the order.

It is not necessary that the complainant allege that the contemner has the ability to comply with the order violated; the burden is upon the contemner to prove his inability to comply with the order, so as to purge himself of the contempt (Mossman v. Superior Court, 22 Cal.App 3d 706 at 712).

Petitioner Hilliard argues that as the only other director and 50 percent shareholder of the corporation, he had negative control of the corporation and was unable to change its course. The record shows, however, that during 1968 or 1969, Mr. Hilliard stepped in and asserted control over the corporation, when the company's bookkeeper disappeared. In September of 1972, Mr. Hilliard relinquished control to Mr. Howard. At about the time the instant case went to hearing. Mr. Hilliard again sought control of RDC through court action against Mr. Howard (Tr. 392). At about the same time, Mr. Hilliard caused Application No. 55176 and Application No. 55915 to be filed with the Commission, which, if granted, would have authorized RDC's then current operations subsequently found to be in violation of Decision No. 81766.

It must be concluded that petitioner Hilliard had the ability to take action to prevent RDC and Mr. Howard from operating in violation of Decision No. 81766. It is significant that petitioner Hilliard was inaccessible to Mr. Howard in his capacity as corporate director, officer and attorney for RDC, following issuance of Decision No. 81766 and that action by Hilliard was taken only following the filing of the complaint eight months after Decision No. 81766 was issued. (Compare Rapport v. Superior Court, 39 Cal.App 2d 15 at 22 and 23.) Moreover we find and conclude that such failure to take action during the eight months before the complaint was filed, was a contumacious furtherance of the contempt (Van Hoosear v. Railroad Commission, 189 C.228 (1922)).

After considering each and every allegation set forth in the petition, we are of the opinion that cause for rehearing or reversal of Decision No. 84820 has not been shown. However, we are of the opinion that a new finding of fact should be substituted in place of finding of fact no. 7, in Decision No. 84820.

THEREFORE, IT IS ORDERED that:

1. The following finding of fact shall be substituted for finding of fact no. 7 in Decision No. 84820:

7. Carl B. Hilliard was a director, vice president, 50 percent shareholder and attorney for Radio Dispatch Corp., at the time Decision No. 81766 was issued on August 21, 1973. Upon the issuance of Decision No. 81766, although he did not agree with the decision and knew that Mr. Richard A. Howard did not agree with that decision, Mr. Hilliard became inaccessible to Mr. Howard with respect to the conduct of the business and by his own testimony had little or nothing to do with the conduct of the business from the time Decision No. 81766 was issued until the complaint herein was filed approximately eight months later on April 29, 1974. As a director of the corporation it was Mr. Hilliard's duty to know of the conduct of the affairs of the corporation and to take steps to prevent said corporation from acting unlawfully. This is so particularly in light of the public utility character of the corporation and Mr. Hilliard's longstanding experience in public utility law, especially with respect to the conduct of radio-telephone utility operations in California. We find that the weight of evidence in the record shows that the violation of Decision No. 81766 was caused in part by Mr. Hilliard avoiding knowledge of the affairs of Radio Dispatch Corp., thus contumaciously furthering non-compliance with Decision No. 81766 by Radio Dispatch Corp.

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2. Carl B. Hilliard shall pay the fine in the sum of \$1,000 required by ordering paragraph number 2 of Decision No. 84820, to the Secretary of the Commission on or before August 23, 1976 and, in default thereof, shall be ordered committed to the County Jail of the County of San Bernardino until such fine shall have been paid at the rate of one day's imprisonment for each \$100 of said fine that remains unpaid.

3. IT IS FURTHER ORDERED that Rehearing and Reconsideration of Decision No. 84820 are hereby denied.

The effective date of this order shall be the date hereof.

Dated at San Francisco, California, this 3rd
day of AUGUST, 1976.

I dissent
William L. Quinn-Jr.
Commissioner

[Signature]
President

[Signature]
[Signature]
Commissioners

Commissioner Robert Batimovich, being necessarily absent, did not participate in the disposition of this proceeding.