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Decision 91-12-029 December 18, 1991

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

LEE GALE, individually and dba MANAGEMENT V, and PYRAMID COMMODITIES, INC., a California corporation, Complainants, v. MOBILE CONCRETE, INC., a corporation; UNITED SAND & GRAVEL CO., a corporation; and TTT, INC., a corporation, Defendants.	ORIGINAL Case 87-10-020 (Filed October 16, 1987)

Lurie & Hertzberg, by Bruce J. Lurie, Attorney at Law, for Lee Gale, dba Management V, and Pyramid Commodities, Inc., complainants.
Garfield, Tepper & Ashworth, by Christopher Ashworth, Attorney at Law, for TTT, Inc., Mobile Concrete, Inc., and United Sand & Gravel Company, defendants.

O P I N I O N

Introduction

In this complaint Lee Gale, individually and doing business as Management V, and Pyramid Commodities, Inc. (complainants) seek to recover allegedly excess trailer rental fees charged by Mobile Concrete, Inc., United Sand & Gravel Company, and TTT, Inc. (defendants).

In June 1986 complainants, defendants, and United Ready Mixed Concrete Company, United Pre-mix Concrete Company, and Spancrete (the United Companies) entered into an agreement under which complainants would haul cement, rock and sand for the United Companies, and would purchase certain equipment and lease certain

trailers from defendants. The agreement provided that if defendants' attorneys found a legal way to do so, complainants would pay trailer rental rates of 25% and 30%, respectively, of their gross revenues received for the transportation of cement, and for rock and sand, from the United Companies. Because maximum rental rates allowed under Commission rules are 9%, as set forth in General Order (GO) 150 with respect to cement hauling, and 15%, as set forth in Minimum Rate Tariffs (MRT) 7-A and 17-A with respect to rock and sand hauling, complainants allege that trailer rentals assessed by defendants were excessive and in violation of Commission regulations.

Defendants concede the existence of the agreement, and that the trailer rental rates assessed were 25% of the gross hauling rates for cement, and 30% of the gross hauling rates for rock and sand. Defendants assert they were not carriers, customers, or shippers on the subject transportation, but were merely in the business of leasing trailers, and thus not entities bound by Commission general orders or MRTs 7-A or 17-A. Defendants also contend that complainants lack standing to bring this complaint.

Evidentiary hearings were conducted in Los Angeles April 5, 6, and 7, 1988 before Administrative Law Judge (ALJ) Pilling, and on April 16, 1991 before ALJ Lemke. Between 1988 and 1991 hearings were continued in order to allow the parties opportunity to prosecute motions to dismiss the proceeding. The case was initially submitted upon the filing of concurrent briefs on June 10, 1991. By ALJ ruling dated August 14 submission was set aside to provide for the filing of supplemental briefs by September 6, 1991 on the issue of Commission jurisdiction. The matter was resubmitted with the filing of the supplemental briefs.

Defendants maintain that since Lee Gale had no operating authority, he simply has no standing to complain that he has paid too much for trailer rentals set forth in GO 150 and MRTs 7-A and

17-A, because even if those regulations were applicable to the subject transactions, they apply only with respect to leases to carriers.

Further, defendants argue that Pyramid Commodities has no standing to prosecute this complaint proceeding, since there was no direct relationship between any of defendants on the one hand, and Pyramid on the other. Thus, defendants contend, if anyone owes money to Pyramid, it is Lee Gale, doing business as Management V, since it was Gale who re-leased the trailing equipment to Pyramid.

Defendants acknowledge that they are owned by the same extended family group as two of the carrier customers (freight bill payers) in this proceeding, i.e., United Pre-Mix and United Ready Mixed Concrete Co. However, defendants maintain that this common ownership is insufficient to taint the business associations involved in this case with an improper alter ego relationship. For instance, defendants insist that there is no evidence of any economic benefit flowing to either United Pre-Mix or United Ready Mixed by virtue of the fact that the trailer lessors were owned by the same families that owned the carrier customers. They profess that all entities were separately incorporated, filed separate income tax returns, and observed arms-length proprieties when conducting inter-company business, e.g., they assessed the same rental charges to Management V as were assessed complete strangers. Finally, defendants assert that any excessive lease payments should be paid by Lee Gale to the Commission.

The Facts

1. Defendants leased trailers to Lee Gale, doing business as Management V, charging Gale 25% of all revenues generated by equipment hauling cement, and 30% of all revenues generated by equipment hauling rock and sand. Gale re-leased these trailers to Pyramid on the same 25%/30% basis. Gale is owner and president of Pyramid.

2. All five corporations in question are wholly owned by Tom Tedesco and Joe Tedesco. These corporations include two of the trailer-leasing defendants - Mobile Concrete and TTT, and the three freight bill payers on the involved transportation - United Ready Mixed Concrete, United Pre-mix Concrete, and Spancrete. The third defendant, United Sand & Gravel, was a partnership owned by Joe Tedesco's and Tom Tedesco's children, and managed by Tom Tedesco. However, the permit to operate as a dump truck carrier of United Sand & Gravel lists the company as a dba of Tom Tedesco, Joe Tedesco and F. J. Tedesco. Thus, Tom Tedesco managed, partly owned, or operated all six companies. Defendant's witness, Pat Vicencio, testified that Tom Tedesco ran defendants and the United Companies.

3. Neither complainants nor defendants were acting as overlying or underlying carriers in the subject transportation.

4. Defendants and the United Companies all operated from the same office. Pat Vicencio testified she was employed by United Ready Mixed Concrete as its bookkeeper, and also did the bookkeeping for each of the defendants. Maintenance on the trailers owned and leased by defendants was performed by mechanics employed by the United Companies.

5. Defendants collected some of the rental charges from complainants by causing the United Companies to withhold such sums from amounts paid by the United Companies to complainants for hauling.

6. Included in each defendant's dump truck carrier permit and in TTT's permit to operate as a cement carrier (Exhibit 22) are standard Commission alter ego restrictions. For example, paragraph 10 of United Sand & Gravel's permit provides:

> "Whenever permittee engages other carriers for the transportation of property of T. S. Tedesco or F. J. Tedesco or J. S. Tedesco or United Sand and Gravel Company or Mobile Concrete Co., Inc. or TTT, Inc. or United Premix Concrete, Inc. or customers or suppliers of said

> individuals or partnerships or corporations, 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."

7. Tom Tedesco testified that in the spring of 1986, based upon a discussion with Gale, Tedesco knew that Pyramid Commodities was a company he knew to be affiliated with Gale, and to have performed hauling for the United Companies.

8. Exhibit 9 is a schedule of revenues, assessed on the basis of applicable minimum rates, paid to Gale. Part 1 of the exhibit relates to the transportation of rock and sand. It shows that during the period June 1986 through December 1986 gross revenues for this transportation amounted to $758,284.52. Trailer rentals (15%) permissible under MRT 7-A or 17-A amount to $113,742.67; however, Gale paid trailer rentals on this transportation of $176,632.38, an alleged overpayment of $62,889.71.

9. Part 2 of Exhibit 9 relates to the transportation of cement. During the seven-month period June through December 1986 gross revenues amounted to $422,774.52. Trailer rentals (9%) permissible under GO 150 amount to $38,049.72; however, Gale paid trailer rentals on this transportation of $74,387.08, an alleged overpayment of $36,337.36. Total alleged overpayments for trailer rentals on the combined transportation of rock and sand, and cement are $99,227.07.

General Order 150

Defendants argue that the provisions of GO 150 regarding leasing of trailing equipment do not apply to situations other than those involving transactions between overlying and underlying carriers. They refer to Rule 13 of GO 150: "A. No lease of trailer equipment shall provide for the payment of rental in excess of 9% of the charges applicable under the rates prescribed in the

overlying carrier's tariff or contract for the transportation performed in said trailer equipment,..." (Emphasis added.)

We recently addressed this precise issue in Decision (D.) 91-09-002, dated September 6, 1991 in Application 90-08-023 (mimeo. p. 5, Footnote 3) as follows:

> "The 9% limit in Rule 13.1 is calculated by determining the overlying carrier's tariff or contract charges. The reference to 'overlying' might appear to bolster the position that Rule 13.1 is inapplicable to the subject leases if one infers that the rule is operative only when there is an overlying carrier/underlying carrier relationship. We reject such an interpretation.
>
> "When an earlier version of the rule was adopted, the Commission clearly intended that the 9% limit would apply to carrier/shipper relationships (to prevent rebates) as well as intercarrier relationships. (D.69557; Minimum Rate Tariff 10 (1965) 64 CPUC 684.) In the case of shipper/carrier leases, the limit applied whether or not there was also an overlying carrier/underlying carrier relationship involved. The term 'overlying' did not appear in the rule when it was a component of former Minimum Rate Tariff (MRT) 10. It was added along with other minor language changes when MRT 10 was cancelled and a program of carrier-filed rates was adopted. (See D.82-02-134.)
>
> "It is apparent that the language changes were made merely to adapt the rule to the new regulatory program of carrier-filed rates, not to substantively change the rule. The only meaning that can be given to the term 'overlying' in Rule 13.1 is that whenever there is an overlying carrier/underlying carrier relationship, it is the former's filed transportation charges that form the basis for calculation of the 9% limit."

Discussion

Considerable evidence was presented during the conduct of this proceeding concerning the alter ego relationship, through

common ownership, management, and control of the three defendant trailer lessors, and the shippers of the cement and the rock and sand transported in the leased trailers. Indeed, the Commission has recognized this alter ego relationship by conditioning of the carrier permits issued to TTT, etc. It appears to us that the existence of this alter ego relationship is undeniable, and one which would warrant close examination if presented to the Commission in an investigative proceeding. Furthermore, the payments made by Gale/Pyramid to defendants, to the extent they exceeded 9% in the case of cement hauling, and 15% in the case of rock and sand hauling, because of the alter ego relationship between defendants and shippers constitute a device operating to defeat the minimum rates named in MRTs 7-A and 17-A, as well as cement rates applicable under the provisions of GO 150.

Public Utilities (PU) Code § 3669 provides:

> "No person, corporation, or any officer, agent, or employee of a corporation shall, by means of false billing...or by any other device or means, whether with or without the consent or connivance of a highway permit carrier, or any of its officers, agents, or employees, seek to obtain or obtain transportation for property at less than the minimum rates or charges or more than the maximum rates or charges established or approved by the commission."

By virtue of the common ownership, management, and control between defendants and the United Companies, the payments to Gale/Pyramid of the 25% and 30% trailer rental charges resulted in a financial benefit to those common owners that should not, and would not otherwise have occurred.

We conclude that the excessive charges were improperly assessed by defendants, and paid by complainants, because of the alter ego relationship between defendants and the United Companies. Gale has held operating authority issued by this Commission for many years. He knew, or should have known, that the arrangement he entered into with defendants and shippers was an improper one. We

find that Gale came to this Commission with unclean hands and should be put on notice for participating in such a devious arrangement. Moreover, defendants should have known better than to enter into this type of arrangement and should be similarly cautioned.

However, we cannot find that the Commission has jurisdiction over these arrangements within the context of this complaint proceeding, and conclude that the proceeding must be dismissed. PU Code § 1702 states, in effect, that complaint may be made by the Commission of its own motion, or by any person, setting forth any act or thing done or omitted to be done by any public utility. And PU Code § 3731 provides that complaints may be made in regard to matters pertaining to highway permit carriers in the same manner as specified in Part 1 of Division 1 of the PU Code.

Rule 9 of the Commission's Rules of Practice and Procedure sets forth the bases and limitations for prosecuting complaints before this Commission. Rule (a) thereof provides that any party may complain of any act or thing done or omitted to be done by any public utility, while paragraph (b) provides that a party may complain of any rate or charge assessed by a highway carrier in violation of any provision of law, or of any rule or order of the Commission.

In the case before us, the violations have occured because of overcharges by defendants as trailer lessors and alter egos of the freight bill payers on the transportation at issue, and by undercollections by complainants. Defendants did not violate any provision of the PU Code, or the Highway Carriers Act, or any rule or decision of the Commission in their role as highway permit carriers, or public utilities.

The correct remedy for complainants in these circumstances would have been to seek recovery of the excess trailer rentals in a court of competent jurisdiction. PU Code § 3671 provides, in part: "All complaints for the collection of

lawful charges, or any part thereof, of highway permit carriers may be filed in any court of competent jurisdiction within three years from the time the cause of action accrues, and not thereafter;..." Thus, since the transportation of cement, and rock and sand was performed pursuant to cement contract carrier and dump truck carrier authority held, or which should have been held, by complainants, the provisions of PU Code § 3671 apply and provide the appropriate course of action for recovering charges improperly assessed.

PU Code § 737 provides that "...complaints for the collection of lawful tariff charges of public utilities may be filed in a court of competent jurisdiction within three years from the time the cause of action accrues, and not after,..." To the extent the transportation of cement may have been performed pursuant to cement carrier (public utility) operating rights held, or which should have been held, under authority granted pursuant to the Public Utilities Act, PU Code § 737 provides the appropriate course of action for recovering charges improperly assessed.

Defendants in their supplemental brief argue that, properly characterized, the complaint seeks (1) a declaratory order that GO 150 and MRTs 7-A and 17-A apply to the trailer leasing arrangement between the parties, and (2) an award of monetary damages. They assert that because the Commission has no power to do either, the complaint fails to state a cause of action within the jurisdiction of the Commission.

Defendants refer us to Bayview Freightlines v. DePue Warehouse Co. of San Francisco (1970) 71 CPUC 503, and cases cited therein, and to Athearn Transportation Consultants, Inc. v. ANR Freight Systems, Inc., et al. (1987) 26 CPUC 2d, 104, 112.

In Bayview complainant sought a determination by the Commission that defendant's two warehouses were not contiguous, but rather were two separate and distinct points of origin. The Commission dismissed the proceeding, holding that the complaint

sought a declaratory judgment and therefore failed to state a cause of action within the jurisdiction of the Commission. But we do not necessarily concur with defendant that complainant's plea constitutes a request for a declaratory judgment; and it is not necessary that our decision here hang on that determination. We are dismissing the complaint simply on jurisdictional grounds relating to defendants' roles not as highway carriers, or public utilities, but rather as lessors.

In Athearn we dismissed the complaint against certain tariff publishing agents, because they were not public utilities, holding that Commission jurisdiction to hear complaints under PU Code § 1702 is limited to those concerning acts done or omitted to be done by public utilities. In Toward Utility Rate Normalization v. PT&T Co. and Foote, Cone & Belding/Honig 83 CPUC 318, we dismissed the complaint with respect to Foote, Cone & Belding/Honig because that defendant was not a public utility.

Complainants in their supplemental closing brief refer us to Pratt v. Coast Trucking Inc. 228 Cal. App. 2d at 149-150, and to Kelly Trucking Company, D.76055 (1969) as authorities for its claim that this Commission has authority to order payment of lawful charges. But in Kelly we ordered a prime carrier to pay subhaulers amounts due, as a result of our own investigation (Case 8805, filed May 14, 1968) and not a complaint proceeding. In Pratt plaintiff had appealed a judgment of the superior court in favor of defendants. Plaintiff, at the instance and direction of the Commission, had brought action against defendants for a balance claimed to be due as full charges for prime hauling at the rate prescribed by the Commission. Defendants had taken the position that the decision of the Commission finding that the defendant carrier and its alter ego lumber company had entered into an arrangement constituting a device to secure lower transportation charges was not binding upon the court. Again, the issues involved in Pratt had their genesis in a Commission investigation of the

trucking company, not in a complaint proceeding. (The court, in fact, stated in its decision: "The respondents correctly contend that the courts of this state do have jurisdiction under the law to entertain cases relating to the recovery of sums which are due pursuant to rates for transportation.") The issue before the court in Pratt was not the question of primary jurisdiction, but rather whether a trial court was bound to follow the decision of the Commission. (The appellate court found, of course, that the lower court was so bound.)

We again voice our strong displeasure with all parties involved here - complainants, defendants, and shippers in concocting this device, a stratagem obviously designed to circumvent payment of the correct minimum rates and charges applicable to this transportation. Therefore, we will direct the Executive Director to cause the Transportation Division to undertake an audit of the transportation records of complainants as soon as practicable, and of the records of any other carriers who may be known to recently have performed transportation for the shippers and lessors on this transportation.

Comment and Reply

In accordance with PU § 311, the ALJ's proposed decision was mailed to the parties on November 14, 1991.

Complainants did not file comments. Defendants filed comments, but "are not taking major exception to the form of the findings of fact and conclusions of law contained in the proposed decision." Defendants urge that certain findings be amplified and slightly corrected, and that other materials found in the discussion section of the proposed decision become either findings of fact, or perhaps find their way into the ordering paragraphs.

The recommendations of defendants express primarily their preference with respect to wording in the decision concerning the culpability of complainants in this disreputable venture. They do not focus on factual, legal, or technical errors. There is no need to modify the proposed decision, particularly since we are

dismissing the complaint for failure to state a cause of action within the jurisdiction of the Commission.

Complainants' reply effectively disputes defendants' comments, and urges that no change be made to the proposed decision.

Findings of Fact

1. Complainants in 1986 performed transportation services for the United Companies, involving the hauling of rock and sand, and of cement, with trailing equipment leased from defendants.

2. Defendants and the United Companies are operated under common ownership and management, and are in fact alter egos.

3. MRTs 7-A and 17-A provide that charges paid by a freight bill payer to a carrier furnishing a tractor and driver without trailing equipment, but towing trailing equipment furnished by the freight bill payer, shall be not less than 85% of the otherwise applicable charge.

4. GO 150, effective during the period the subject transportation was performed, provided, in pertinent part, that "No lease of trailer equipment shall provide for the payment of rental in excess of 9% of the charges applicable under the rates prescribed in the overlying carrier's tariff or contract for the transportation performed..."

5. While the subject transportation was not performed pursuant to an overlying/underlying carrier agreement, it was, nevertheless, subject to the 9% trailer lease provision named in GO 150 because of the alter ego relationship between defendants and the United Companies.

6. The existence of the alter ego relationship between defendants and the United Companies constituted a device under which the payments of trailer rentals in excess of 9%, in the case of cement hauling, and of 15%, in the case of rock and sand hauling, amounted to undercollections of otherwise lawful charges for the transportation in question.

7. PU Code §§ 1702 and 3731, and Rule 9 of the Commission's Rules of Practice and Procedure, provide that complaints may be

filed against public utilities, or against highway permit carriers, setting forth any act or thing done or omitted to be done by any public utility, or any rate, charge, or provision affecting any rate or charge of any highway permit carrier.

8. Defendants, in their roles as lessors to complainants of trailing equipment and as alter egos of tho shippers, were acting neither as public utilities nor as highway permit carriers in connection with the subject transportation.

9. PU Code § 737, in the case of public utilities, and § 3671, in the case of highway permit carriers, specify that the collection of lawful charges may be filed in any court of competent jurisdiction.

Conclusions of Law

1. The complaint fails to state a cause of action within the jurisdiction of this Commission.

2. The complaint should be dismissed.

O R D E R

IT IS ORDERED that:

1. Case 87-10-020 is dismissed.

2. The Executive Director is directed to cause the Transportation Division to undertake an audit of the transportation records of complainants and of any other carriers which may be found to have performed transportation recently for the shippers and lessors involved herein.

This order becomes effective 30 days from today.

Dated December 18, 1991, at San Francisco, California.

I CERTIFY THAT THIS DECISION WAS APPROVED BY THE ABOVE COMMISSIONERS TODAY

NEAL J. SHUMAN, Executive Director

PATRICIA M. ECKERT
President
JOHN B. OHANIAN
DANIEL Wm. FESSLER
NORMAN D. SHUMWAY
Commissioners