

DEC. 16. 1992

Decision 92-12-061 December 16, 1992

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own)
motion into the operations and)
practices of Michael G. Cardoza, an)
individual doing business as Michael)
Cardoza Trucking and Mike Cardoza)
Trucking, Inc., a California)
corporation.)

ORIGINAL

I.91-02-078

(Filed February 21, 1991)

Greene, Chauvel, Dugoni & Descalso, by
Ronald C. Chauvel, Attorney at Law, for
Michael G. Cardoza, and Mike Cardoza
Trucking, respondent.
James T. Quinn, Attorney at Law, and William
Waldorf, for Transportation Division.

OPINION

This investigation concerns a highway carrier who continued to operate even after his operating authorities were suspended because his terminal failed several California Highway Patrol (CHP) safety inspections.

Michael G. Cardoza (Cardoza), an individual doing business as Michael Cardoza Trucking, holds operating authorities including a highway common carrier certificate (T-103,625); the certificate was issued in place of a radial highway common carrier permit in 1980. He (together with his wife) also controls a corporation, Michael Cardoza Trucking, Inc., (MCT) which holds similar operating authorities from the Commission (T-161,986). The corporation received these authorities in November of 1989.

After Cardoza failed several CHP inspections of his terminal under the Biennial Terminal Inspection (BIT) program during 1989 and 1990, the CHP recommended that Cardoza's individual

1 While there is nothing of record, we are informed that Attorney Chauvel has withdrawn.

operating authorities be suspended under §§ 1070.5 and 3774.5.² As required by statute, the Commission, acting through the Director of the Transportation Division, suspended the Cardoza authorities, (but not MCT's authorities) on July 11, 1990. Despite the suspension, operations continued unabated, purportedly in reliance on MCT's authorities.

Cardoza responded to the suspension by filing an application to restore his operating rights Application (A.) 90-07-040. When hearing was conducted (August 26, 1990), it was disclosed that Cardoza's trucks were still operating, under color of the corporate authority. It was clear that the corporation was using the the same terminal facility and the same personnel, procedures and practices which had resulted in Cardoza's unsatisfactory rating.³

After some delay, the CHP reacted to this disclosure by asking to have MCT's authorities suspended as well. MCT's authorities were suspended on September 4, 1990. MCT's filed an application to have that suspension lifted, A.90-09-008. The two applications were then joined for subsequent hearings.

Cardoza/MCT continued to operate.

The first hearing had been taken off calendar with the consent of all parties, to allow an immediate reinspection of the terminal, under the expectation that a satisfactory rating could be achieved. However, even though the carrier had instituted a wide-ranging reform of its maintenance and inspection practices, the terminal was again found unsatisfactory. There followed a

² Unless otherwise noted, all statutes cited are found in the Public Utilities Code.

³ The terminal had been rated unsatisfactory because too many vehicles were found to be in unsafe operating condition, and because of apparent violations of driver's hours of safety regulations, concealed by falsified entries.

series of hearings and re-inspections, which terminated when Cardoza/MCT finally achieved a conditionally satisfactory rating on January 14, 1991.

Once the satisfactory rating was achieved, the Director of the Transportation Division immediately rescinded the suspension of both authorities. Cardoza and/or MCT had continued to operate from the time MCT's authorities were suspended until the suspension was lifted on January 14, 1991.⁴

Discussion

This OII was issued to determine whether and what sanctions should be imposed on Michael Cardoza and his corporate alter ego for operating during the suspensions.

In this OII, respondents have admitted that operations continued without interruption during the suspension of the individual authorities alone and during the suspension of both sets of authority. The main question to be resolved is the severity of sanction to be imposed. There are also disputes concerning the impact of MCT's filing for bankruptcy, and the question of whether an offense was committed when operations were conducted during the period when MCT's, but not the individual's authorities, were still in force.

Staff contends that the operations conducted during the period when only MCT had operating authority should be treated as if they were conducted by the individual. It seeks to apply the equitable alter ego doctrine, which holds that when a corporation is dominated by a individual, its acts can be deemed to be those of the individual, rather than the corporation. Staff contends we should disregard the separate legal identity of the corporation (and the fact that there were two sets of operating authority), and

⁴ Subsequently, Decision 91-04-045 closed out the Applications as moot.

deem these to be operations of the individual conducted without a permit or certificate in violation of §§ 1070, 1063, 3775 and 3571. It also seeks a finding that operations continued after both individual and corporate authorities were suspended.

Staff originally sought a fine in the amount of \$50,000 or a suspension of all operating authorities for six months. After submission, the ALJ convened a telephonic post-hearing conference for the purpose of determining, among other questions, if the Staff had considered whether either sanction should be imposed regardless of whether doing so could put respondents out of business, and hence constitute a de facto revocation. The Staff changed its position to recommend outright revocation, confirmed by letter of May 6, 1992.

The respondents argue that there has been sufficient mitigation that no additional sanctions should be imposed. In particular, they point out that Cardoza has been arrested and sentenced by a court to community service for several instances of operating without operating authorities.⁵

The respondents contend that operating under the unsuspended corporate authorities was legitimate. They appear to have abandoned their contention that the Commission should suspend proceedings against the corporation since it is under the protection of the bankruptcy court.

Alter Ego Problems

Staff contends that operations conducted after August 11, 1990 and before September 4, 1990 should be deemed to have been conducted by the individual. Under this theory, the operations would have violated those sections of the Code which prohibit

⁵ Under § 2105, the imposition of a penalty by a court does not bar the Commission from imposing additional sanctions for the same conduct.

operations under suspended certificates or permits. It contends that the alter ego doctrine should be applied, since Cardoza controls the corporation and the use of its separate legal identity and its authorities was a sham to violate safety requirements.

According to the Staff, this attempt to operate behind the corporate veil was not only a sham but a clumsy sham. For example, Cardoza did not report the "lease" of his vehicles to the Commission as required by General Order 130. In addition, agricultural commodities were transported despite the fact that only the individual held an agricultural permit.

Cardoza contends that operations during this period were legitimate because of the failure to suspend all of the operating authorities he controlled.

We need no lengthy discussion to demolish that argument. His ploy exposed the public to a hazard which the statutory suspension was designed to avoid. His terminal operations were unable to identify unsafe vehicles before they were dispatched onto the highways. Whether or not the individual or corporate name was used, the same terminal, the same procedures and personnel were involved, and the same hazard was imposed on other highway users, due to the operations conducted between August 11, 1990 and the date when the corporate authorities were suspended (September 4, 1990).

Cardoza also claims that the terms of the OII failed to raise the alter ego issue correctly.

At a highly technical level, Cardoza's criticism of the OII has a point. The OII did not allege facts which would have been necessary to prove Cardoza's responsibility for the corporate activity, such as Cardoza's stock ownership and control over corporate activities at both policy and operational level.

However, on a more realistic level, such omissions did not deprive either respondent of a fair hearing. The basic facts

needed to establish control are included in the Commission's own files as a result of data which the carriers were required to file.

Moreover, the tenor of the hearings on the Applications could have left Cardoza in no doubt that the Staff would proceed against him personally for corporate operations on the alter ego theory. It should be emphasized that he was represented throughout those proceedings by an attorney who is a recognized expert on Commission procedure. Even a far less experienced counsel would have alerted his client to the Commission's historical reliance on the "alter ego" doctrine.

It is even more significant that Cardoza did not claim to be surprised at staff's assertion of the alter ego theory or object to the introduction of evidence at hearing. We will, therefore, revoke the corporate authorities since they duplicate Cardoza's individual authorities and since they were used in a manner to endanger the public. We have concluded that revocation would be an appropriate disposition of these authorities even if the corporation had acted in a truly independent manner to dispatch trucks from Cardoza's inadequate maintenance/repair system onto the highways.

Bankruptcy

During the evidentiary hearing on this proceeding, counsel for respondents moved for an automatic stay of proceedings since the MCT corporation was concurrently involved in bankruptcy proceedings.⁶ After argument, the ALJ ruled from the bench that an automatic stay was not required by Federal law.

Federal statutes provide that the filing of a bankruptcy proceeding automatically stays certain pending actions and actions

⁶ In re Mike Cardoza Trucking, Inc., Case No. 990-01539-7, Bankruptcy Court, Eastern District of Calif. (Modesto Div.).

on pre-existing causes of action;; this includes actions in administrative proceedings. (11 U.S.C. § 362 (a)(1).)

The ALJ ruled, however, that this proceeding was covered by 11 U.S.C. § 362 which excepts proceedings "to enforce police or regulatory power" from the automatic stay provisions. He reasoned that this proceeding is one to enforce a public policy interest in safety, rather than one to further the State's pecuniary interest in MCT's property. In re Commerce Oil Co. 847 F.2d 291 (1988); NLRB v Edward Cooper Painting, Inc. 804 F.2d 934 (1986). Cf. also Calif. American Trucking, (1984) 14 CPUC 2d 374,380. Staff also pointed out that a fine, penalty or forfeiture for misconduct is not dischargeable in bankruptcy. (11 U.S.C. § 523 (a)(7).)

In our view, the ALJ's ruling was proper and we adopt it. Should the Cardoza's Individual Authorities be Revoked?

As noted above, we have decided to revoke MCT's authorities. To prevent future abuse and to ensure that Cardoza does not use another corporate front to evade his responsibilities as a carrier, we will also prohibit him from using any other corporation to operate a trucking business under our jurisdiction.

We now turn to the Staff's recommendation that the individual authorities be revoked as well. Its goal is now to permanently prohibit Cardoza from conducting a California trucking business again. Its basic reason for stiffening its recommendation is that public officials have already spent too much time and effort because of his scofflaw behavior.

Cardoza argues that he is basically a good operator, and that such an order would deprive him of his livelihood. He also contends that he has now cured the problems which originally led to the suspensions. He has pointed out that he was convicted of operating without authority in the courts, based on citations by the CHP. He was assigned to a substantial number of public service hours, which were performed on time.

We have weighed the argument that the Commission and CHP have already expended too much time and effort to deal with a single scofflaw. In our opinion, this is now a weak argument. Neither Staff nor CHP took effective timely action to take Cardoza's vehicles off the road while his maintenance program was, in their view, an active menace to the public.⁷

Moreover, Staff/CHP did not ask for an OII until Cardoza's system had finally achieved the level of competence to pass a CHP inspection. Even after the hearing in this matter, Staff's first recommendation was for suspension or fine, not revocation. The recommendation for revocation came only after the ALJ asked whether either of its original recommendations could become a de facto revocation by destroying respondents' business.

If Staff/CHP had moved for revocation immediately on discovering that the corporate authority was being abused, such a sanction would have had a maximum deterrent effect on other carriers who might have considered trying to evade a safety suspension. Neither Staff nor the CHP are the defendants in this proceeding. Cardoza et al. are. Whether the prosecution of this investigation could have been better is not the issue. The central issue of the severity of the sanction should not be prejudiced by a perception of a delay in enforcement. Even though an object lesson may be less necessary now, the need for a maximum deterrent remains.

⁷ Staff chose instead to concentrate on meeting Cardoza's attempts to bring his maintenance procedures up to the level where his trucks could pass a safety inspection. While it took far longer than expected to achieve this level of competence, Staff/CHP should not be faulted for electing to follow this route rather than adopting a more Draconian strategy.

In dealing with Cardoza's mitigation arguments, we recognize that revocation would injure Cardoza and his family economically. We recognize that it may be a long time before he can find another comparable source of income. We also recognize that revocation may have devastating psychological effects. Nevertheless, such considerations must remain secondary, if continued operations would pose any safety hazards and the devastating impacts a serious accident would have on the public. Consequently, we have given little weight to such arguments.

We have also given little weight to the sanctions imposed by the court or the fact had that Cardoza has actually provided a substantial number of hours of public service. The sentences apparently disregarded the fact that public safety was directly involved in the violations.

There are aggravating factors. While Cardoza has finally passed one CHP terminal inspection, we cannot find that his system will be consistently satisfactory in the future. It seems at least arguable that he has not done what he could to end the falsification of driver logbooks. With regard to vehicle maintenance, it is still not clear that Cardoza or his safety staff are unreservedly committed to keeping defective or uninspected trucks in the shop.

Worse yet, Cardoza apparently believes that he has been a good operator and that overzealous public officials are to blame for his misfortunes. He apparently still views the operations after suspension as a mere peccadillo. He is unwilling to accept full responsibility for conduct which valued his own economic well-being over the public's safety.

Cardoza seeks to mitigate by alleging that his terminal organization always repaired all the safety defects found by CHP inspectors. This argument is so wide of the mark that it instead supports Staff demands for revocation, since it indicates that he is still unwilling to recognize how he endangered the public.

We must emphasize that the objective of the BIT program would be frustrated if it accomplished only the repair of defects found by CHP inspectors. CHP inspectors can come calling only once every other year--a satisfactory terminal operation is one which can protect during the other 729 days. Cardoza's operation was suspended because it was inadequate to find and fix safety problems when CHP inspectors were not on-site. The suspension was intended not as punishment, but to protect other highway users from his inadequately maintained vehicles. His defiance of that suspension exposed the public to unacceptable hazards. It is only by great good luck that the inadequacy of his terminal operation did not cause an accident during the period of unlawful operation.

Finally, we note that Cardoza attempted to fraudulently conceal his unauthorized operations in several instances by using the name and T-number assigned to his father. (This use was not authorized or disclosed to his father.)

Therefore, there is an unacceptable level of probability that Cardoza will de-emphasize his vehicle safety program whenever it seems to pose a threat to revenues. Moreover, he has demonstrated that he is more likely than the average carrier to defy a future suspension of his operating authority. Despite the mitigating factors mentioned above, such findings strongly support revocation.

Because of the egregious nature of the offenses and the need to preserve public safety, this order should be made effective immediately.

Comments

Transportation Division filed comments on December 7, 1992. The comments reasserted that Cardoza's operations during suspension constituted a particularly aggravated offense. In Staff's words, the offenses were "...the most flagrant, wilful and extensive series of violations ever encountered by staff investigators."

The comments noted that unlawful operations continued even while Commission personnel, including a representative of the assigned Commissioner's office, were in Cardoza's terminal to observe one of the series of safety reinspections.

The comments also reemphasize that Cardoza was convicted of operating without authority in court and that he continued to operate even during the court's probation period.

Division argues that any sympathy for Cardoza would be wasted and would be seen as compromising the Commission's emphasis on safety compliance.

Division has not challenged the ALJ's recommendation for a fine rather than revocation. Because of the gravity of the offenses, however, we must oppose the ALJ's recommendation for a fine whether in one payment or by installment. The sanction adopted today is revocation.

Findings of Fact

1. Michael Cardoza continued to operate as a highway carrier after his operating authorities were suspended. This was accomplished by having the service performed under the authorities held by Michael Cardoza Trucking, Inc.

2. During the period when such operations were performed under the authorities of Michael Cardoza Trucking, Inc., the corporation used the same trucks, the same terminal, the same procedures, and the same drivers and shop personnel as had been found unsatisfactory and which caused the individual's authority to be suspended.

3. The operating authorities held by Michael Cardoza Trucking, Inc. in File T-161,986 were used as a device to enable vehicles owned and maintained by and registered to Michael Cardoza, to operate after the operating authorities held by him, in his individual capacity, had been suspended.

4. Michael Cardoza operated as a highway permit and a highway common carrier after the operating authorities held both by

him and by Michael Cardoza Trucking, Inc. were suspended. There were at least 84 days of operation, between September 4, 1990 and January 14, 1991 when both suspensions were lifted.

5. Cardoza knowingly attempted to conceal operations after suspension by using the T-number and corporate name of his father without permission.

6. Michael Cardoza should be prohibited from ever again serving a highway or permit carrier corporation as an owner, officer, or person in control.

7. There is an unacceptable probability that Cardoza will allow unsafe vehicles to operate on the highways in the future. There is an unacceptable probability that Cardoza will again continue to operate after the Commission has suspended operating authorities under § 1070.5 or 3774.5.

8. Cardoza's operations after suspensions were sufficient in number, severity, and potential harm to the public to warrant unconditional revocation.

9. On September 25 and 30, 1991, and on October 9, 1991, Michael Cardoza was cited by the California Highway Patrol for operating as a motor carrier without Commission authority. These violations constituted a violation of probation in Amador County Case 90-2162.

10. Michael Cardoza's probation in Case 90-2162 was revoked on April 1, 1992. He was sentenced to 30 days in jail but in lieu of jail was allowed to report to a weekend work program.

11. Public safety requires that this order be made effective immediately.

Conclusions of Law

1. The bankruptcy filing of Michael Cardoza Trucking, Inc. does not operate to stay this proceeding as to that corporation.

2. Even though the OII did not adequately allege sham or alter ego operations, the activities of the corporation merit revocation of its authorities.

3. We should revoke Michael Cardoza Trucking, Inc.'s corporate authority unconditionally.
4. We should unconditionally revoke all individual operating authorities held by Michael Cardoza dba as Michael Cardoza Trucking.
5. Michael Cardoza should be prohibited from ever again serving a highway or permit carrier corporation as an owner, officer, or person in control.
6. In D.90-02-021, the Commission emphasized its commitment to highway safety.
7. In order to preserve public safety, this order should be made effective immediately.

ORDER

IT IS ORDERED that:

1. All of the operating authorities held by Michael Cardoza Trucking, Inc. in File T-161,986 are revoked.
2. All operating authorities held by Michael Cardoza in File T-103,625 are revoked.
3. Michael Cardoza shall not serve as owner, officer, member of the board of directors, or person in control of any corporation which holds operating authority from this Commission.

This order is effective today.

Dated December 16, 1992, at San Francisco, California.

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

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