Opinion No. 60-236

December 28, 1960

BY: OPINION of HILTON A. DICKSON, JR., Attorney General

TO: Mr. Patrick Hanagan District Attorney Fifth Judicial District Roswell, New Mexico

QUESTION

FACTS

The operation of the firm in question is principally as follows:

The firm is engaged in paving and road construction work. It mines its own caliche under a New Mexico State lease covering a caliche pit on State land. Under the leasing and royalty payment arrangement with the State, the firm is the owner of the caliche when it has been extracted. The firm owns a rock crusher which crushes the caliche. It also owns a processing plant (commonly known as a hot mix plant) and in that plant mixes the crushed caliche with road oil. After the mixing process it becomes known as a "hot mix." On some paving or surfacing jobs the crushed caliche is transported and spread at the job site and the road oil applied to it at the job site. On other jobs the hot mix product is transported already mixed. The paving or surfacing is done at the job site for others under the usual paving contracts for an agreed contract price. The method of operation of this firm, involving transportation of its product from its plant to the job site, is similar to that of other firms engaged in the same business throughout the State. It appears to be a common practice with this firm for it to lease dump trucks from other persons for transportation of the hot mix or caliche product to the job site when they have jobs to do. Since their jobs are not constant, the depreciation on a sufficient number of trucks to do a job with dispatch when they have a job would be greater than competitive conditions within the industry would permit. In the usual case, this contractor will hire as a driver of the truck either a casual employee or use one of its regular employees who performs other duties when there is not a truck driving job to perform to drive the leased vehicle. All of such drivers are properly licensed to drive such a vehicle. The majority of the paving jobs are done under contract with governmental bodies and it is my understanding that the enforcement officers concur in the position of the contractor that the Motor Carrier Act does not cover the operations on public jobs. Occasionally there is a job to be done for a non-governmental entity which involves incidental use of the public highways for transportation of the hot mix or caliche product owned by the contractor and applied by him at the job site.

QUESTION

Upon these facts, are the contractor, the driver or the lessor of the truck in violation of the Motor Carrier Act when they are operating without a Certificate of Convenience and Necessity?

CONCLUSION

See analysis.

OPINION

*{*660}* **ANALYSIS**

Section 64-27-2, N.M.S.A., 1953 Comp., defines a common motor carrier as follows:

"The terms common motor carrier, when used in this act, shall mean any person who or which undertakes, whether directly or by lease, or any other arrangement, to transport passengers or property, or any class or classes of property for the general public, by motor vehicle for hire over regular routes, under scheduled service or over irregular routes under unscheduled service; * * *"

This section, however, contains the following proviso:

"* * * Provided, however, that operators of motor vehicles engaged in the transportation of sand, gravel, rock, crushed rock, rock ballast, or dirt obtained or produced on the job or for a specified project under a federal, state, or municipal contract, transported over irregular routes under unscheduled service shall not be classified as a common motor carrier."

Section 64-27-14 defines contract motor carriers of property as "any person engaged in the transportation by motor vehicle of property for hire and not included in the term 'common motor carrier of property' * * *."

This latter section contains the identical exclusion pertaining to operators of motor vehicles engaged in the transportation of road materials obtained or produced on the job for the specified federal, state, county or local contract. It follows from this exclusion which is applicable to common carriers as well as contract carriers that if the road contractor comes within it, he is not subject to motor carrier regulation by the Corporation Commission. It is to be noted, however, that upon the facts stated, the contractor hauls not only caliche but the asphalt or the oil necessary to mix with the caliche in the preparation of the "hot mix". It is to be noted also that this operation is sometimes done at the job site and it is sometimes done at the mine where the caliche is crushed. The oil or asphalt *{*661}* used in the operation is not specified in the exclusion above set out and the materials which are excluded are those which are produced on the job.

Keeping this in mind and in view of the fact that the facts stated above do not specify the manner in which the asphalt is transported nor its ownership previous to mixing, this opinion can only give a caveat upon that point.

Insofar as materials which are produced on the job are concerned, such as the caliche, dirt and rock, there is no question but that they are excluded from the operation of the Motor Carrier Act where the particular job involved is a public job. But where, as in some instances, the job to be done involves a non-governmental entity then and in that event the exclusion does not protect the carrier. This office has examined the form of the lease under which the contractor obtains and operates the leased units in question. It is to be noted that paragraph 2 gives the lessee "full custody and control of said vehicle" and that the lessee "shall pay all expenses of operation, shall hire and fire drivers and shall have full and exclusive control over them and shall and may use the vehicle to deliver lessee's own commodities but shall not use the same to transport or deliver commodities of another." In view of the agreements contained in such lease and if, in fact, the lessee has full control and custody over the equipment in question as well as the drivers and those vehicles are used only to haul the materials to the job, this office is of the opinion that such an operation does not come within the regulation of the Motor Carrier Act so as to require the lessee or the lessor to obtain a Certificate of Public Convenience and Necessity. This conclusion is reached solely on the basis that the lessee, in this case the road contractor, has full custody and control of the vehicles and he is transporting commodities with said vehicles which we believe come within the principle laid down in the case of **Marsh Aviation Company, Inc. v. The New Mexico Corporation Commission,** 55 N.M. 178. As we read that case, it stands for the proposition that transportation which is incidental to a service is not contemplated to be within the Motor Carrier Act. The principle of that case would seem to be applicable here. The main purpose or object of the work being road construction -- the obtaining of the materials being incidental to that object.

By: Patricio S. Sanchez

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