Opinion No. 39-3207

July 11, 1939

BY: FILO M. SEDILLO, Attorney General

TO: Mr. Henry Eager, Member, State Corporation Commission, Santa Fe, New Mexico. Attention: Mr. W. F. Nance, Motor Transportation Department

*{*79}* We have your letter of July 7 making certain inquiries as to the applicability of the New Mexico Motor Transportation Act (Chapter 154, Laws of 1933, as amended) to certain truck operations under lease agreements.

For convenience, I shall set out three fact situations as follows:

First Fact Situation

"A" IS A MERCHANT, CONTRACTOR, OR OTHER BUSINESS CONCERN. "B," A TRUCK OWNER, LEASES HIS TRUCK FOR A CONSIDERATION OUTRIGHT TO "A," WHO TAKES FULL POSSESSION, CUSTODY, AND CONTROL OF THE *{*80}* TRUCK. "A" PAYS ALL OPERATING EXPENSES AND HIRES AND FIRES HIS OWN DRIVERS, AND HAS FULL AND EXCLUSIVE CONTROL OVER THEM. "A" DELIVERS HIS OWN COMMODITIES.

Under the foregoing fact situation "A" is not subject to the Motor Transportation Act by virtue of the holding of our Supreme Court in the case of Rountree vs. State Corporation Commission, 40 N.M. 152, 56 Pac. 2nd 1121.

"B," likewise, is not, in my opinion, subject to the Motor Transportation Act by virtue of the holding of our Supreme Court in the case of Roeske vs. Lamb, 39 N.M. 111, 41 Pac. 2nd 522 and cases cited therein.

Second Fact Situation

"A" IS A MERCHANT, CONTRACTOR, OR OTHER BUSINESS CONCERN. "B," A TRUCK OWNER, LEASES HIS TRUCK TO "A" FOR A CONSIDERATION. "B" DRIVES THE TRUCK HIMSELF OR HIRES AND PAYS A DRIVER TO OPERATE THE TRUCK UNDER HIS EXCLUSIVE CONTROL AND SUPERVISION. "B" ALSO PAYS ALL OPERATING EXPENSES. "B," PURSUANT TO THE LEASE, TRANSPORTS "A's" COMMODITIES.

Under the foregoing second fact situation, it is my opinion that "B's" operations fall within the Motor Transportation Act. I believe that in such a case the courts would hold that "B" is transporting property for hire, and that the lease or contract arrangement between "A" and "B" is a mere subterfuge or device to evade the Motor Transportation Act.

In point is the California case of Holmes vs. Railroad Commission, 197 Cal. 626, 242 Pac. 487, which was distinguished but otherwise cited with approval by our Supreme Court in the Rountree decision, supra. Justice Brice, in discussing the Holmes case said in the Rountree decision:

"The appellants in that case were engaged in operating three motortrucks in the transportation of merchandise from twenty-three wholesale houses in San Francisco to retailers in near-by cities: 'By each of these contracts the petitioners purported to lease their trucks to the shipper for use by the latter in transporting its merchandise from San Francisco to points in Santa Clara and San Mateo counties at an agreed rental of $ 19.50 per truck per day.'

The contract further provided that, if the trucks were loaded only at part capacity, a corresponding reduction in cost should be made. The court stated: 'It is apparent from the other provisions of these 'leases,' and from the manner in which they were performed by the parties, that they are nothing more than contracts for the transportation of merchandise for compensation,' **a mere subterfuge to defeat the law** * * * *."

Another case in point is the Maryland case of Goldsworthy vs. Maloy, 141 Md. 674, 119 A. 693, wherein the court states as follows by way of discussion:

"The use of motor vehicles in carrying passengers and property has become very general in this state, as well as elsewhere, and while such business should not be unnecessarily interfered with, the protection of the public demands careful supervision and proper control over them, in so far as they are brought within the statutes. **The owners certainly should not too readily be permitted to enter into contracts, or adopt measures which will enable them to readily evade the letter or the spirit of the statutes intended to govern them."**

The Ohio court, in passing on a situation where a truck operator hauled live-stock under a special contract with an elevator company who purchased the stock from farmers, said in the case of Public Utilities Commission vs. Boughtonville Farmers Exchange Company, 400 Ohio App., 395 178 N.E. 859:

"It was merely a device which enabled the truck owner to carry on the work of a common carrier through the defendant company. If such a device could be used to evade the law, all truck owners engaged in transporting goods to market as common carriers could operate under special contract with another person, or a corporation, and avoid the legal necessity of obtaining *{*81}* a certificate of public convenience and necessity."

Exactly in point is the Texas case of Reavley vs. State (Tex. Cr. App), 63 S.W. 2nd 709. According to the opinion, the facts in that case were as follows:

"Under the memorandum of agreement, appellant paid all of the expenses of operation, including the wages of the driver. He kept the truck in good running condition. He agreed to hold Armour & Co. from any claim which might be made against said company by the driver under the compensation laws of Texas in the event of injury to the driver. He obligated himself to substitute another truck in the event of a breakdown, or if for any other reason the truck in question could not be used. The contract stipulated the approximate number of miles the truck would be driven a week; provided that any excess mileage should not be considered as a breach of the contract, nor make Armour & Co. liable for greater compensation than $ 60. per week. Appellant was responsible to the company for the proper remittance of all collections made by the driver."

On the foregoing facts the court stated as follows:

"Appellant takes the position that the evidence on the part of the state shows that the truck was not engaged in the transportation of property for compensation or hire, but was being operated exclusively by Armour & Co. in the hauling of its own products. We are unable to bring ourselves to appellant's view. **We are constrained to hold that the trial court was warranted in concluding that the method employed was merely a device which enabled appellant to use the truck in transporting property for compensation or hire without first having complied with the statutes to which reference has been made."**

The Texas court concluded that "the plan adopted by appellant did not obviate the necessity of obtaining a permit as required by law."

See also the cases of Davis vs. Commission, 79 Colo. 642, 247 Pac. 801, and Northshore Fish and Freight Company vs. Trucking Association (Minn.) 263 N.W. 98.

A case which might be cited as holding contrary to our position here is the case of Entremont vs. Whitsell, (California) 80 Pac. 2nd 987, but that case is distinguishable in that although the truck was leased with the driver, the lessee had the right to fire the driver for failure to perform his duties and replace him, and the court held that the truck driver was not the employee of the truck owner but rather found that under the facts in the case he was a "special employee" of the lessee, which in this case happened to be the California Department of Public Works. The court found in effect that the facts were analogous to our first fact situation, supra, and the case therefore cannot be said to be inconsistent with our position herein.

From the foregoing we conclude under the second fact situation that "B" is subject to and falls within the provisions of the Motor Transportation Act.

Third Fact Situation

"A" IS A MERCHANT, CONTRACTOR, OR OTHER BUSINESS CONCERN. "B," A TRUCK OWNER, LEASES HIS TRUCK TO "A" FOR A CONSIDERATION. "B" DRIVES THE TRUCK HIMSELF OR HIRES AND PAYS A DRIVER TO OPERATE THE TRUCK

UNDER HIS EXCLUSIVE CONTROL AND SUPERVISION. "A," HOWEVER, PAYS ALL OPERATING EXPENSES OF THE TRUCK OTHER THAN THE DRIVER'S SALARY. "B," PURSUANT TO THE LEASE, TRANSPORTS "A's" COMMODITIES.

Under the authorities cited under the second fact situation, supra, it is my opinion that "B" under fact situation three likewise is subject to and falls within the provisions of the Motor Transportation Act. The only possible difference between fact situation two and three would be in the amount of consideration paid by "A" taking into account the expenses of operating the truck. Under the second situation, "A" would probably pay a larger consideration to "B" than he would under the third situation, but in either case the conclusion is inescapable that "B" is transporting the goods of "A" for hire, and that the lease or contract agreement between "A" and "B" is, as stated by Justice *{*82}* Brice, "a mere subterfuge to evade the law."

Trusting the foregoing sufficiently answers your inquiry, I am,

By: FRED J. FEDERICI,

Asst. Atty. Gen.