

ORIGINALDecision No. 67998

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's)
 own motion into the operations,)
 rates, charges, and practices of)
 James R. Green, doing business as)
 JIM GREEN'S TRUCKING COMPANY. }

Case No. 7763

Musick, Peeler & Garrett, by Albert
Mosher, for respondent.

Lawrence O. Garcia and Charles P.
Barrett, for the Commission staff.

O P I N I O N

By its order dated October 29, 1963, the Commission instituted an investigation into the operations, rates, charges and practices of James R. Green, doing business as Jim Green's Trucking Company.

A public hearing was held before Examiner Gravelle on January 15, 1964 at Los Angeles. The matter was submitted subject to the filing of briefs, the last of which was filed on July 20, 1964.

Respondent presently conducts operations pursuant to Radial Highway Common Carrier Permit No. 19-53520, Highway Contract Carrier Permit No. 19-53521 and City Carrier Permit No. 19-53522, all dated October 14, 1960. Respondent maintains no terminal facilities. He owns one piece of equipment but does not operate it. He employs one person. His total gross revenue for the year ending September 30, 1963 was \$261,942. Copies of the appropriate tariff and the distance table were served upon respondent.

In March and June of 1962, a representative of the Commission's Field Section visited respondent's offices and checked his records for the period from October 1961 through April 1962, inclusive. The underlying documents relating to thirteen shipments were taken from respondent's files, photocopied and the copies submitted to the License and Compliance Branch of the Commission's Transportation Division. They were introduced in evidence as Exhibit No. 2. Based upon the data taken from said shipping documents a rate study was prepared and introduced in evidence as Exhibit No. 3. Said exhibit reflects undercharges in the amount of \$530.46.

The undercharges involved in this proceeding are not the major contention of the Commission staff. It is the staff position, in part, that this proceeding is a direct outgrowth of a prior Commission action. Case No. 6320, which resulted in Decision No. 61963 dated May 9, 1961, was an investigation into the operations, rates and practices of Nell V. Lewis and LaVerne Villerme, doing business as Certified Transport, and of D. B. Lewis, Lewis Food Company, and the Organization to Repeal Federal Income Taxes (ORFIT). Decision No. 61963 was appealed to the Supreme Court of the State of California by means of a Petition for Writ of Review. Said petition was denied by the Court on October 4, 1961. The Commission hereby takes official notice of that decision and the action of the Court. In general, Decision No. 61963 found that the carrier involved in that proceeding was a device by which the shipper obtained transportation at rates less than the minimum prescribed by the Commission. The staff in the instant proceeding contends, among other things, that respondent is continuing the practice proscribed by the prior

decision and is thereby evading the effect of the order in Decision No. 61963. Counsel for respondent argues that no party to the previous investigation or decision is a party herein, nor was respondent a party to the prior proceedings. In this argument he is quite obviously correct. The only person who might reasonably be directly connected with both proceedings is Nell V. Lewis Green who is the spouse of respondent and was a party to Case No. 6320. While she may have a community interest in the business of respondent, she is not legally a party to this investigation.

While it is true that there is insufficient evidence to sustain a finding that respondent is evading the order of the Commission in Decision No. 61963, that is not to say that the evidence adduced herein will not support a finding that he, too, is providing transportation to a shipper at rates less than the minimum through the use of a device. The Commission would be more than lax in its duties if it were to close its eyes to the similarities common to the two cases. Respondent testified that he had been an employee of Lewis Food Company, the shipper involved in both proceedings, "Prior to November 1960". He obtained his permits from this Commission in October of 1960. From November of 1960 to October 10, 1961, he voluntarily suspended his permits for the stated reason that he was gainfully employed elsewhere. That employment, by his own testimony, was for the carrier which was a respondent in Case No. 6320. The work he performed for said carrier was rating and billing. It should be noted that respondent secured his permits between the time of hearing in Case No. 6320 and the time a decision was rendered in that proceeding. Six days after the Supreme Court denied the Writ of Review in Case No. 6320, respondent herein activated his permits. The present operation finds

respondent holding the permits, and his wife (a respondent in Case No. 6320) performing the rating and billing. Respondent's shipping documents as reflected by Exhibit No. 2 are the same as used by Certified Transport with the permit numbers of Certified crossed out and respondent's inserted in their place and the name Certified Transport replaced by Jim Green's Trucking. The offices are the same in each case; the shipper is the same in each case; the methods of operation are the same in each case, including not only the exclusive use of subhaulers but also the use of Northern California carriers seeking back-hauls. Mrs. Green (Nell V. Lewis) admitted to the staff investigator that the operations of Jim Green's Trucking were the same as Certified Transport.

The major distinction between the two cases is that in the prior proceeding the Commission found an "alter ego" device. There is no such "alter ego" situation in the instant case, but that, of course, does not preclude the finding of a device other than an "alter ego" type if the evidence so indicates.

The staff presented testimony of two disinterested persons who had business dealings with Lewis Food Company. They each identified respondent as the sales manager of Lewis Food Company during 1962 and 1963. Staff counsel presented Lewis Food Company documents dated in 1962 authorizing sales instructions to jobbers and brokers and bearing the name "James Green Sales Department" (Exhibit No. 1). The author of those instructions was respondent. The evidence shows that respondent maintains an office or at least "desk space" elsewhere in the Lewis Food Company building. He was identified as the sales manager by a Lewis Food Company receptionist and he answered a telephone call directed to the Lewis Food

Company sales manager. The evidence further shows that respondent had represented Lewis Food Company in a formal proceeding before this Commission on August 30, 1961 in Case No. 5330, Order Setting Hearing of May 16, 1961. A review of respondent's testimony as recorded in the official transcript of said case leaves little doubt as to his representation on behalf of the shipper. The position stated therein appears odd for one about to activate his permits and engage actively in the transportation business. Respondent has an expense account with Lewis Food Company which he submits on a regular monthly basis. The explanation given by respondent for all the evidence of employment mentioned above is that he acts as a "consultant" on a friendly basis to D. B. Lewis and Lewis Food Company in an effort to increase their business and, consequently, his own transportation business. The contention of the Commission staff is that Lewis Food Company is paying its sales manager by means of his purported operation of a for-hire trucking business in which only subhaulers are used and at rates differing from and less than the minimum, said difference being his sales manager remuneration. The staff points out that this device lowers the shipper's operating costs even though the shipper may pay the purported carrier the full minimum rate and that such a device undermines the minimum rate structure and allows discrimination in favor of such shipper.

We find, as the staff contends, that respondent's services for the shipper constitute an indirect refund to Lewis Food Company and a device whereby Lewis Food Company obtains transportation at rates less than the minimum.

The staff also contends that respondent is acting as a motor transportation broker and that the subhaulers who perform the actual transportation are in reality prime carriers. The fact that respondent holds operating authority as a "carrier" does not in and of itself make respondent one transporting property for compensation. Neither does the fact that respondent holds no license as a motor transportation broker preclude his actions and services from being those of such a broker. Staff counsel cites United States v Drumm, 368 U.S. 370, 7 L.ed. 2d 360, to show what the Supreme Court of the United States has determined to be some of the characteristic burdens of the transportation business. They are:

1. The large capital investment in equipment and risk of premature depreciation and catastrophic loss.
2. The risk of a rise in variable costs such as fuels, repairs, and maintenance.
3. The risk of nonutilization of high-priced equipment.

From the evidence it is clear that respondent has assumed none of these characteristics, hence, it may be said that respondent's operation in reality is more akin to that of a broker than that of a carrier. It must be noted at this point that respondent while acting as a broker is performing even that function in violation of Public Utilities Code Section 4835 which prohibits a broker from having any affiliation with a shipper. The use of subhaulers has not been precluded by this Commission nor have the rates they collect under Minimum Rate Tariff No. 2 been fixed. The Commission has, however, seen fit, when circumstances dictated, to restrict the permits it has issued so that

certain carriers are required to pay subhaulers they employ for the account of particular shippers the full minimum rate. The Commission has also on many occasions ordered its permittees to pay to subhaulers who have actually performed the function of Prime carriage the full minimum rate. We find that the evidence adduced in this proceeding warrants the imposition of such a restriction on respondent's permits and, further, that such evidence warrants an order that respondent pay to the subhaulers he has engaged, and who have in reality been the prime carriers, the full minimum rates.

Respondent's basic argument has been on his view of the evidence. Suffice it to say that the Commission does not view the evidence in the same light as does respondent. Stemming from respondent's view of the evidence is the conclusion that for the Commission to impose any sanction upon respondent would exceed the jurisdiction of the Commission and violate respondent's rights to due process and the equal protection of the law. We find the evidence in this proceeding to show clearly that respondent is engaged, through the use of a device and the use of purported subhaulers, in an activity that impairs the minimum rate structure and violates the Public Utilities Code. Respondent has been well represented by counsel and has had the opportunity to be heard and to argue his case. We do not feel that his constitutional rights are hereby impaired in any way.

After consideration the Commission finds that:

1. Respondent operates pursuant to Radial Highway Common Carrier Permit No. 19-53520, Highway Contract Carrier Permit No. 19-53521 and City Carrier Permit No. 19-53522.

2. Respondent was served with the appropriate tariff and the distance table.

3. Respondent charged less than the lawfully prescribed minimum rate in the instances as set forth in Exhibit No. 3, resulting in undercharges in the amount of \$530.46.

4. Respondent performs services for Lewis Food Company in its sales department for which he receives payment in the form of the difference between the minimum rates and the rates paid to the purported subhauliers who are in fact prime carriers, this activity constituting a device whereby respondent through the use of his permits is allowing Lewis Food Company to obtain transportation at less than the minimum rates in Minimum Rate Tariff No. 2.

Based upon the foregoing findings of fact, the Commission concludes that respondent violated Sections 3667 and 3668 of the Public Utilities Code and should pay a fine in the amount of \$1,000.

The order which follows will direct respondent to review his records to ascertain all undercharges that have occurred since April 1, 1962 in addition to those set forth herein. The Commission expects that when undercharges have been ascertained, respondent will proceed promptly, diligently and in good faith to pursue all reasonable measures to collect them. The staff of the Commission will make a subsequent field investigation into the measures taken by respondent and the results thereof. If there is reason to believe that respondent, or his attorney, has not been diligent, or has not taken all reasonable measures to collect all undercharges, or has not acted in good faith, the Commission will

reopen this proceeding for the purpose of formally inquiring into the circumstances and for the purpose of determining whether further sanctions should be imposed.

O R D E R

IT IS ORDERED that:

1. Respondent shall pay a fine of \$1,000 to this Commission on or before the twentieth day after the effective date of this order.

2. Respondent shall examine his records for the period from April 1, 1962 to the present time, for the purpose of ascertaining all undercharges that have occurred.

3. Within ninety days after the effective date of this order, respondent shall complete the examination of his records required by paragraph 2 of this order and shall file with the Commission a report setting forth all undercharges found pursuant to that examination.

4. Respondent shall take such action, including legal action, as may be necessary to collect the amounts of undercharges set forth herein, together with those found after the examination required by paragraph 2 of this order, and shall notify the Commission in writing upon the consummation of such collections.

5. In the event undercharges ordered to be collected by paragraph 4 of this order, or any part of such undercharges, remain uncollected one hundred twenty days after the effective date of this order, respondent shall institute legal proceedings to effect collection and shall file with the Commission, on the first Monday of each month thereafter, a report of the undercharges

remaining to be collected and specifying the action taken to collect such undercharges and the result of such action, until such undercharges have been collected in full or until further order of the Commission.

6. Respondent shall review his records for all transportation performed for Lewis Food Company wherein purported subhaulers were used to perform the actual transportation during the period from October 1, 1961 to the effective date of this order. Respondent shall pay to such purported subhaulers the difference between the lawful minimum rate and charge applicable to such transportation and the amount previously paid to such furnishers of transportation ostensibly as subhaulers. Said payment shall be completed no later than one hundred and twenty days after the effective date of this order.

7. The Secretary of the Commission is directed to cause to be amended, on the effective date of this order, Radial Highway Common Carrier Permit No. 19-53520, Highway Contract Carrier Permit No. 19-53521, and City Carrier Permit No. 19-53522 issued to James R. Green by prohibiting James R. Green whenever he engages other carriers in connection with the transportation of property for Lewis Food Company or its customers or suppliers, from paying such other carriers less than the applicable minimum rates established by the Commission.

The Secretary of the Commission is directed to cause personal service of this order to be made upon respondent. The effective date of this order shall be twenty days after the completion of such service.

Dated at San Francisco, California, this 6th day of OCTOBER, 1964.

Frederick B. Holbrook
President

George E. Grover

William L. Bennett

Commissioners

Commissioner Everett C. McKeage, being necessarily absent, did not participate in the disposition of this proceeding.

COMMISSIONER PETER E. MITCHELL DISSENTING:

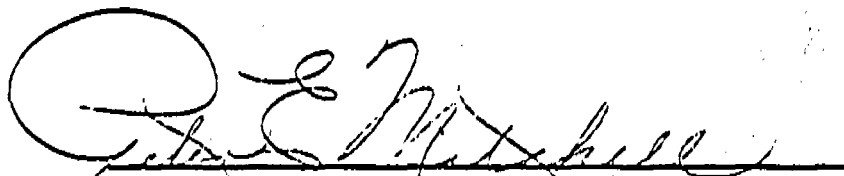
The permits of the respondent should be revoked. The only exercise of the permits by the respondent has been for one shipper, the Lewis Food Company, and the decision finds such use a device to violate the minimum rate tariff.

The majority (twice) finds that the respondent, through the use of its permits, is allowing the Lewis Food Company to obtain transportation at less than the minimum rates. Further, they find that the respondent's services for the shipper constitute an indirect refund to the Lewis Food Company.

The Commission in the past has indicted shipper-carrier relationships, when there was such a unity of interest or control, whereby the shipper was able to obtain transportation of property at rates less than minimum by the carrier's use of subhauling (Truck Maintenance, Inc. - 59 PUC 103).

It can only be concluded from the findings that the shipper herein, through its identity with and control of the respondent, was able to obtain transportation of its property at rates less than minimum. Nonetheless, no action is taken against the shipper in the decision although it is found to be the principal beneficiary of the low rates.

The decision also should proceed against the shipper, the Lewis Food Company.


Peter E. Mitchell, Commissioner

San Francisco, California

October 15, 1964